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Supreme Court, U.S.
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No. 03-633
(CAPITAL CASE)

In the
SUPREME COURT OF THE UNITED STATES
October Term, 2003

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

CHRISTOPHER SIMMONS,
Respondent.

On Writ of Certiorari
to the Supreme Court of Missouri

JOINT APPENDIX

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Petition for Certiorari filed October 24, 2003
Certiorari Granted January 26, 2004

TABLE OF CONTENTS

Relevant docket entries A-2

Penalty phase jury instructions in *State of Missouri v. Christopher Simmons* A-6

Missouri Supreme Court April 29, 1997 opinion in *State of Missouri v. Christopher Simmons*, No. SC77269 (Mo. banc) A-21

Petition for Writ of Habeas Corpus in *State ex rel. Christopher Simmons v. Al Luebbers*, No. SC84454 ..... A-75

Missouri Supreme Court Writ of Habeas Corpus in *State ex rel. Christopher Simmons v. Al Luebbers*, No. SC84454 ..... A-89

Return in *State ex rel. Christopher Simmons v. Al Luebbers*, No. SC84454 ..... A-91

Missouri Supreme Court August 26, 2003 o*pinion in *State ex rel. Christopher Simmons v. Donald P. Roper*, No. SC84454 ..... A-107

Missouri Supreme Court August 26, 2003 mandate in *State ex rel. Christopher Simmons v. Donald P. Roper*, No. SC84454 ..... A-151

Relevant Docket Entries
No. 084454

State ex rel. Christopher Simmons,	)
Petitioner,	)
vs.	)Original Proceeding: HABEAS
Al Luebbers, Superintendent, Potosi Correctional Center,	) CORPUS
Respondent.	)

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2002

May 3	Petition for writ of habeas corpus filed, w/s.
May 9	Respondent's suggestions in opposition filed with service.
Jun 20	Order issued: The parties are requested to file suggestions with respect to the applicability of the decision of the Supreme Court of the United States in Atkins v. Virginia, No. 00-8452, to the petition in this case as it relates to the age of the petitioner at the time of the offense and any other issue to which the decision relates. Petitioner's suggestions shall be filed on or before July 22, 2002. Respondent's suggestions shall be filed on or before August 12, 2002. Reply suggestions, if any, shall be filed on or before August 22, 2002.
July 22	Motion for leave to file Amicus suggestions of American Civil Liberties Union filed with service.
July 23	Motion for leave to file Amicus Suggestions of American Civil Liberties Union sustained. Suggestions of American Civil Liberties Union filed with service.
July 23	Petitioner's motion for leave to file suggestions one day out of time filed with service and sustained.
July 23	Petitioner's suggestions filed with service.
Aug. 12	Respondent's supplemental suggestions in opposition to petition for writ of habeas corpus filed with service.
Aug. 22	Petitioner's reply to Respondent's supplemental suggestions in opposition to petition for writ of habeas corpus filed with service.
Aug. 30	Respondent's motion for leave to file a second supplemental suggestions in opposition to petition for writ of habeas corpus filed with service.
Aug. 30	Respondent's motion for leave to file a second supplemental suggestions in opposition to petition for writ of habeas corpus sustained.
Aug. 30	Respondent's second supplemental suggestions in opposition to petition for writ of habeas corpus filed with service.

Oct. 23	Respondent's motion for leave to file his third supplemental suggestions in opposition to petition for writ of habeas corpus filed with service and sustained.
Oct. 23	Respondent's third supplemental suggestions in opposition to petition for writ of habeas corpus filed with service.
Nov. 7	Petitioner's reply to Respondent's second and third supplemental suggestions n opposition to petition for writ of habeas corpus filed by leave of Court.
Nov. 26	Petition for writ of habeas corpus sustained. Writ of habeas corpus ordered to issue returnable to Court en Banc in fifteen days (due 12-11-02).
Dec. 11	Writ return/answer filed with service.

2003

Jan. 8	Petitioner's motion for extension of time to file opening brief filed, with service.
Jan. 9	Petitioner's motion for extension of time to file brief sustained until January 17, 2003. Petitioner's brief is now due on or before January 17, 2003.
Jan. 15	Cause docketed for oral argument on March 5, 2003.
Jan. 21	Petitioner's motion for leave to file brief one day out of time filed with service and sustained. Petitioner's brief filed with service.
Feb. 10	Respondent's brief filed, with service.
Feb. 18	Petitioner's motion for additional oral argument time filed with service.
Feb. 18	Petitioner's motion for additional time for oral argument overruled.
Mar. 3	Petitioner's request to file reply brief out of time filed, w/s, and sustained.

Mar. 3	Petitioner's reply brief filed, with service.
Mar. 5	Argued and submitted.
Aug. 26	Opinion by Stith, J. Sentence of death set aside resentenced to life imprisonment without eligibility for probation, parole, or release except by act of the Governor. White, C.J., Wolff and Teitelman, JJ., concur; Wolff, J., also files separate concurring opinion; Price, J., dissents in separate opinion filed; Benton and Limbaugh, JJ., concur in opinion of Price, J.
Sept. 12	Certified copy of opinion and mandate sent to Donald P. Roper, Superintendent, Potosi Correctional Center.

INSTRUCTION NO. 1

Those who participate in a jury trial must do so in accordance with established rules. This is true of the parties, the witnesses, the lawyers, and the judge. It is equally true of jurors. It is the Court's duty to enforce those rules and to instruct you upon the law applicable to the case. It is your duty to follow the law as the Court gives it to you.

However, no statement, ruling, or remark that I may make during the trial is intended to indicate my opinion of what the facts are. It is your duty to determine the facts and to determine them only from the evidence and the reasonable inferences to be drawn from the evidence. In this determination, you alone must decide upon the believability of the witnesses and the weight and value of the evidence. In determining the believability of a witness and the weight to be given to testimony of the witness, you may take into consideration the witness' manner while testifying; the ability and opportunity of the witness to observe and remember any matter about which testimony is given; any interest, bias, or prejudice the witness may have; the reasonableness of the witness' testimony considered in the light of all of the evidence in the case; and any other matter that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness.

Faithful performance by you of your duties as jurors is vital to the administration of justice. You should perform your duties without prejudice or fear, and solely from a fair and impartial consideration of the whole case.

INSTRUCTION NO. 2

You must not assume as true any fact solely because it is included in or suggested by a question asked a witness. A question is not evidence, and may be considered only as it supplies meaning to the answer.

From time to time the attorneys may make objections. They have a right to do so and are only doing their duty as they see it. You should draw no inference from the fact that an objection has been made.

If the Court sustains an objection to a question, you will disregard the entire question and you should not speculate as to what the answer of the witness might have been. The same applies to exhibits offered but excluded from the evidence after an objection has been sustained. You will also disregard any answer or other matter which the Court directs you not to consider and anything which the Court orders stricken from the record.

The opening statements of attorneys are not evidence. Also, you must not consider as evidence any statement or remark or argument by any of the attorneys addressed to another attorney or to the Court. However, the attorneys may enter into agreements or stipulations of fact. These agreements and stipulations become part of the evidence and are to be considered by you as such.

INSTRUCTION NO. 13

The law applicable to this stage of the trial is stated in these instructions and Instructions No. 1 and 2 which the Court read to you during the first stage of the trial. All of these instructions will be given to you to your jury room for use during your deliberations on punishment.

You must not single out certain instructions and disregard others or question the wisdom of any rule of law.

The Court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

In these instructions, you are told that, in order to consider the death penalty, you must find beyond a reasonable doubt certain propositions relating to aggravating circumstances. The burden of causing you to find these propositions beyond a reasonable doubt is upon the state.

A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the truth of a proposition. The law does not require proof that overcomes every possible doubt. If, after your consideration of all the evidence, you are firmly convinced that a proposition is true, then you may so find. If you are not so convinced, you must give the defendant the benefit of the doubt and must not find such proposition to be true.

INSTRUCTION NO. 14

You found the defendant guilty of murder in the first degree. At this stage of the trial it will be your duty to determine within the limits prescribed by law the punishment which must be imposed for that offense.

The punishment prescribed by law for murder in the first degree is either death or imprisonment for life by the Division of Corrections without eligibility for probation or parole.

INSTRUCTION NO. 15

At this stage of the trial, the law requires that certain circumstances be considered in making your decision as to the punishment to be imposed. We will proceed as follows:

First, the attorneys will have an opportunity to make a statement outlining any additional evidence to be presented. Such evidence may then be introduced.

After that, the Court will instruct you as to the circumstances you should consider in determining the punishment.

Then the attorneys may make their arguments.

You will then go to the jury room, deliberate, and arrive at your verdict.

INSTRUCTION NO. 16

In determining the punishment to be assessed against the defendant for the murder of Shirley Crook, you must first unanimously determine whether one or more of the following aggravating circumstances exists:

1. Whether the murder of Shirley Crook, was committed for the purpose of receiving money or any other thing of value.

2. Whether the murder of Shirley Crook was committed while the defendant was engaged in the perpetration of the felony of burglary.

3. Whether the murder of Shirley Crook was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of defendant.

4. Whether the murder of Shirley Crook involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find:

That the defendant killed Shirley Crook after she was bound by defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore, if you do not unanimously find from the

evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

INSTRUCTION NO. 17

If you find and believe from the evidence beyond a reasonable doubt that one or more of the aggravating circumstances submitted in Instruction No. 16 exists, it will then become your duty to decide whether the aggravating circumstances are sufficient to warrant the imposition of death as punishment of defendant. In deciding that question, you may consider:

1. All of the evidence relating to the murder of Shirley Crook.

2. Any of the aggravating circumstances referred to in Instruction No. 16 which you found beyond a reasonable doubt.

If you do not unanimously find from the evidence beyond a reasonable doubt that those aggravating circumstances you have found warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

INSTRUCTION NO. 18

If you decide that one or more sufficient aggravating circumstances exist to warrant the imposition of death, as submitted in Instruction No. 16, each of you must then determine whether one or more mitigating circumstances exist which outweigh the aggravating circumstance or circumstances so found to exist. In deciding that question, you may consider all of the evidence relating to the murder of Shirley Crook.

1. Whether the defendant has no significant history of prior criminal history.

2. The age of the defendant at the time of the offense.

3. The kind acts that the defendant conducted for his family and friends.

You may also consider any circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree on the existence of the same mitigating circumstance. If each juror finds one or more mitigating circumstance sufficient to outweigh the aggravating circumstances found to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

INSTRUCTION NO. 19

You are not compelled to fix death as the punishment even if you do not find the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstances which you find to exist. You must consider all the circumstances in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

INSTRUCTION NO. 20

You will be provided with forms of verdict for your convenience. You cannot return any verdict as the verdict of the jury unless all twelve jurors concur in and agree to it, but it should be signed by your foreman alone.

If you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Shirley Crook, your foreman must write into your verdict all of the aggravating circumstances submitted in Instruction No. 16 which you found beyond a reasonable doubt.

If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of Shirley Crook by imprisonment for life by the Division of Corrections without eligibility for probation or parole, your foreman will sign the verdict form so fixing the punishment.

When you have concluded your deliberations you will complete the applicable form to which all twelve jurors agree and return it with all unused forms and the written instructions of the Court.

If, after due deliberation, you are unable to agree upon the punishment, your foreman will sign the verdict form so stating. In such case, the Court will fix the defendant's punishment at death or imprisonment for life by the Division of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.

INSTRUCTION NO. 21

The attorneys will now have the opportunity of arguing the case to you regarding the punishment to be imposed. Their arguments are intended to help you in understanding the evidence and applying the law, but they are not evidence.

You will bear in mind that it is your duty to be governed in your deliberations by the evidence as you remember it, the reasonable inferences which you believe should be drawn therefrom, and the law as given in these instructions.

It is your duty to render such verdict under the law and the evidence concerning the punishment to be imposed as in your reason and conscience is true and just.

The state's attorney must open the argument. The defendant's attorney may then make his argument. The state's attorney may then reply. No further argument is permitted by either side.

A-18

VERDICT

(Jurors: Use this form only if the punishment you now assess and declare is death. See Instruction No. 20 for directions as to what must be written on this verdict form. The foreman's signature must appear after the aggravating circumstance.)

As to Count I, we, the jury, having found the defendant Christopher Simmons guilty of murder in the first degree of Shirley Crook, now assess and declare the punishment at death. We have found the following aggravating circumstances beyond a reasonable doubt.

1. The murder of Shirley Crook, was committed for the purpose of receiving money or any other thing of value.

3. The murder of Shirley Crook was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of dependent.

4. The murder of Shirley Crook involved depravity of mind and, as a result, thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. the murder involved the depravity of mind because the defendant killed Shirley Crook after she was bound by defendant and that defendant thereby exhibited a callous disregard of all human life.

\s\ Wayne K. Sven

A-19

VERDICT

(Jurors: Use this form only if the punishment you now assess and declare is imprisonment for life without eligibility for probation or parole.)

As to Count I, we, the jury, having found the defendant Christopher Simmons guilty of murder in the first degree of Shirley Crook, now assess and declare the punishment at imprisonment for life without eligibility for probation or parole.

_____

Foreman

VERDICT

(Jurors: Use this form only if the you are unable to decide or agree upon the punishment. You will bear in mind, however, that under the law it is your primary duty and responsibility to fix the punishment.)

As to Count I, we, the jury, having found the defendant Christopher Simmons guilty of murder in the first degree of Shirley Crook, are unable to decide or agree upon the punishment.

_____

Foreman

STATE of Missouri, Respondent,

v.

Christopher SIMMONS, Appellant.

No. 77269.

Supreme Court of Missouri,
En Banc.

April 29, 1997.

Rehearing Overruled May 27, 1997.

ROBERTSON, Judge.

A jury convicted Christopher Simmons of first-degree murder and recommended that he be sentenced to death for the abduction and murder of Shirley Crook. The trial court sentenced Simmons to death. Simmons appeals, raising numerous points challenging the propriety of his conviction and death sentence and his counsels' performance. Simmons filed a timely Rule 29.15 motion which the trial court overruled. This Court's exclusive appellate jurisdiction is founded on article V, section 3 of the Missouri Constitution. We affirm the judgment of conviction and sentenced and the denial of relief under Rule 29.15.

I.

Facts

Simmons does not challenge the sufficiency of the evidence to support his conviction. We recite the facts only in sufficient detail to reconstruct the factual environment in which

the legal issues arise.

In early September 1993, Christopher Simmons, then age 17, discussed with his friends, Charlie Benjamin (age 15) and John Tessmer (age 16), the possibility of committing a burglary and murdering someone. On several occasions, Simmons described the manner in which he planned to commit the crime: he would find someone to burglarize, tie the victim up and ultimately push the victim off a bridge. Simmons assured his friends that their status as juveniles would allow them to "get away with it." Simmons apparently believed that a "voodoo man" who lived in a nearby trailer park would be the best victim. Rumor had it that the voodoo man owned hotels and motels and had lots of money despite his residence in a mobile home park.

On September 8, 1993, Simmons arranged to meet Benjamin and Tessmer at around 2:00 a.m. the following morning for the purpose of carrying out the plan. The boys met at the home of Brian Moomey, a 29-year-old convicted felon who allowed neighborhood teens to "hang out" at his home. Tessmer met Simmons and Benjamin, but he refused to go with them and returned to his own home. Simmons and Benjamin left Moomey's and went to Shirley Crook's house to commit a burglary.

The two found a back window cracked open at the rear of Crook's home. They opened the window, reached through, unlocked the back door, and entered the house. Moving through the house, Simmons turned on a hallway light. The light awakened Mrs. Crook, who was home alone. She sat up in bed and asked, "Who's there?" Simmons entered her bedroom and recognized Mrs. Crook as a woman with whom he had previously had an automobile accident. Mrs. Crook apparently recognized Simmons as well.

Simmons ordered Mrs. Crook out of her bed and, when she did not comply, Simmons forced her to the floor with Benjamin's help. While Benjamin guarded Mrs. Crook in the bedroom, Simmons found a roll of duct tape, returned to the bedroom, and bound her hands behind her back. The two also taped Mrs. Crook's eyes and mouth shut. They walked Mrs. Crook from her home and placed her in the back of her minivan. Simmons drove the van from Mrs. Crook's home in Jefferson County to Castlewood State Park in St. Louis County.

At the park, Simmons drove the van to a railroad trestle that spanned the Meramec River. Simmons parked the van near the railroad trestle. He and Benjamin began to unload Mrs. Crook from the van and discovered that she had freed her hands and had removed some of the duct tape from her face. Using Mrs. Crook's purse strap, the belt from her bathrobe, a towel from the back of the minivan, and some electrical wire found on the trestle, Simmons and Benjamin bound Mrs. Crook, restraining her hands and feet and covering her head with a towel. Simmons and Benjamin walked Mrs. Crook to the railroad Trestle. There, Simmons bound her hands and feet together, hog-tie fashion, with the electrical cable and covered Mrs. Crook's face completely with duct tape. Simmons then pushed her off the railroad trestle into the river below. At the time she fell, Mrs. Crook was alive and conscious. Simmons and Benjamin threw Mrs. Crook's purse into the woods and drove the van back to the mobile home park across from the subdivision in which Mrs. Crook lived.

Later that day, Simmons went to Moomey's trailer and bragged to Moomey that he had killed a woman "because the bitch seen my face." In the meantime, Steven Crook, Shirley's husband, returned home from an overnight trip and discovered that his wife had not gone to work as scheduled. When he did not hear from his wife by that evening, he filed a missing persons report.

That same afternoon, two fishermen found a body floating in the Meramec River, three quarters of a mile downstream from the railroad trestle. The fishermen notified authorities, who removed the body. The medical examiner identified the body from finger-prints, determined the cause of death as drowning and noted that the victim was alive prior to being pushed from the bridge. The examiner also reported that Mrs. Crook had sustained several fractured ribs and considerable bruising and that these injuries did not result from her fall from the railroad trestle.

The next day, September 10, police received information that Simmons was involved in the murder. They arrested Simmons at his high school and took him to the Fenton, Missouri, police department. Police read Simmons the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Simmons waived his constitutional rights and, after a little less than two hours of questioning, confessed to the murder. He also agreed to videotape a confession and to take part in a videotaped "reenactment" of the murder at the crime scene.

The Jefferson County prosecutor charged Simmons with first-degree murder, burglary, kidnapping and stealing. The trial court severed the last three charges for trial purposes. Simmons sought a change of venue. The trial court refused but agreed to transfer a jury from Cape Girardeau County into Jefferson County to hear the case due to the substantial publicity the crime had received in Jefferson County.

The jury found Simmons guilty of first-degree murder and recommended the death sentence. The trial court sentenced Simmons to death. Simmons filed a Rule 29.15 motion, which his appointed public defender amended in a timely fashion. Following an evidentiary hearing, the motion court overruled Simmons's rule 29.15 motion. Simmons appealed the

conviction, his sentence, and the denial of post-conviction relief.

II.

Venue

Simmons contends that venue did not lie in Jefferson County, but rather in St. Louis County, and that the trial court erred in not transferring the case to St. Louis County or, alternatively, dismissing the charges. Although the burglary and abduction occurred in Jefferson County, Crook's death took place in St. Louis County and thus, Simmons argues, venue lies in St. Louis County.

For support, Simmons cites *State v. Harvey*, 730 S.W.2d 271 (Mo.App. 1987). *Harvey* is inapposite. It holds that ***jurisdiction*** of a murder is properly ***in the state*** in which the defendant delivered the fatal wound or blow.

Venue of homicides is governed by section 565.001.4, RSMo 1994. *State v. Lingar*, 726 S.W.2d 728, 732 (Mo. banc 1987). That statute provides that, in instances where the offense is committed partly in one county and partly in another or where the elements of the crime occur in more than one county, the defendant may be prosecuted in any of the counties where any element of the offense occurred.

Appellate review of this question focuses on whether one can reasonably infer from the facts and circumstances that the crime occurred within the trial court's venue. *Lingar* at 732. The evidence shows that Simmons broke into Shirley Crook's home in Jefferson County, found her there, and believed she would recognized him because he had an automobile accident that involved Mrs. Crook. Simmons bound Mrs. Crook in Jefferson County, placed her in her van in Jefferson County,

and drove to the railroad trestle spanning the Meramec River in St. Louis County, bearing the intent to kill her he had formed in Jefferson County.

Deliberation is an element of first degree murder. Section 565.020.1, RSMo 1994. This Court observed in *Lingar* that the conclusion that the defendant had deliberated the crime within a county is sufficient to establish venue in that county under section 565.001.4. *Lingar,* 726 S.W.2d at 732. *See also Leisure v. State*, 828 S.W.2d 872, 879 (Mo. banc 1992) (finding that deliberation and premeditation within St. Louis City made venue proper although death occurred outside the city limits).

From the evidence, it is reasonable to conclude that Simmons deliberated the crime in Jefferson County. This finding is sufficient to establish venue in Jefferson County under section 565.001.4. The point is denied.

III.

Jury Selection

A.

Simmons assigns error to the trial court's decision to sustain the state's challenges for cause to two venirepersons who expressed a discomfort with and uncertainty about the death penalty, claiming a violation of his Sixth Amendment right to an impartial jury.

When a prospective juror's views on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath," *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 88 L.Ed.2d 841 (1985), the trial court may exclude the juror for cause. The trial court must determine whether the views expressed by a prospective juror will prevent or substantially

impair performance of a juror's duties, subject to appellate review for abuse of discretion. On review, the trial court is afforded great deference because of its superior ability to "interpret and evaluate a venireman's answers and demeanor." *State v. Leisure*, 749 S.W.2d 366, 374 (Mo. banc 1988).

Venireperson Judith Fluegge indicate that her father was a minister, that his teachings emphasized that "it's wrong to take someone's life," and that she would be very uncomfortable considering the death penalty as a punishment option. At her moment of greatest assurance about her ability to impose the death penalty - a moment brought about by defense counsel's attempt to qualify her for the jury - Ms. Fluegge said that she would be willing to listen to evidence as to why she should consider the death penalty and that she could "possibly" consider imposing the death penalty.

Venireperson Laura Hecht also expressed reservations about the death penalty, doubting her ability to concentrate on the evidence with the possibility of participating in a penalty phase deliberation involving the death penalty awaiting her. Her strongest commitment to considering the full range of penalties came when she said in response to defense counsel's inquiry that she "possibly could, yes" consider the death penalty.

We discover no abuse of the trial court's discretion in its decision to sustain the state's challenges for cause to these two venirepersons on the basis of their indecision and, specifically as to Ms. Hecht, on account of her doubts about her ability to concentrate on the evidence. The points are denied.

B.

During voir dire, the state asked:

"Is there anybody here for the sole fact of the defendant's age could not sit in judgment in this case?"

"You're not saying that just because of his age you would never consider [the death penalty]? You would be able to at least consider it?"

"And is your position that because of the Defendant's age, you could not consider both punishments?"

"I'm not saying that you shouldn't be able to consider a person's age. What I'm saying is wold that totally exclude for you any possibility of considering a sentence of death."

Simmons claims that these questions and statements about his age and their affect on a venirepersons' ability to sit in judgment over him in both the guilt and penalty phases violate the Eighth Amendment to the United States Constitution. Simmons claims that such questioning suggested that age was not a proper mitigating factor and could not be used as a basis for deciding against imposing the death penalty. Simmons further argues that the prosecutor sought a commitment from the jurors to impose the death penalty. Review is for abuse of discretion.

In *State v. Richardson* 923 S.W.2d 301 (Mo. banc 1996), the trial court dismissed potential jurors because they would not consider the death penalty on account of the defendant's age. Richardson claimed that these dismissals were improper because age is a legitimate statutory mitigating factor. This Court upheld the dismissals, noting the difference between the consideration of mitigating circumstances, which jurors must do, and a flat refusal to consider the full range of

punishment, which is grounds for disqualification. *Id.* at 309. Simmons contends that his case is distinguishable because the state led the jurors to believe that they should not consider age at all.

The state's questions and statements explore the issue whether the venirepersons would be able to perform their duties as jurors - whether they would be able to sit in judgment during the guilt phase and whether they would be able to consider the full range of punishment during the penalty phase because of the defendant's age. It remains the law that both the defendant and the state are entitled to a fair jury. Contrary to Simmons's argument, the state's voir dire questions and statements do not suggest that the defendant's age cannot be considered; in fact, the prosecutor expressly rejected that position. Instead, the state's inquires asked whether a potential juror would place too much weight on defendant's age when considering the facts and, ultimately, the appropriate punishment. Nor do the statements seek a commitment to vote for the death penalty.

Richardson controls. The trial court did not abuse its discretion in allowing the questions. The point is denied.

IV.

Confession

Simmons contends that he confessed involuntarily and that he should have a new trial. He claims this despite his receipt of *Miranda* warnings and his waiver of the rights the warnings protect. He maintains his Fifth Amendment rights were violated because he was subjected to interrogation despite his announcement of his intent to remain silent; he also asserts that he was coerced into confessing by intimidation and promises of leniency.

The *Miranda* warnings are "prophylactic." *Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S.Ct. 2875, 2880, 106 L.Ed.2d 166 (1989). They are a judicial creation designed to "assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process," *Miranda*, 384 U.S. at 469, 86 S.Ct. at 1625, despite an "interrogation environment [that] is created for no purpose other than to subjugate the individual to the will of his examiner." *Id.* at 457, 86 S.Ct. at 1619.

The test for whether a confession is voluntary is whether the totality of the circumstances created a physical or psychological coercion sufficient to deprive the defendant of a free choice to admit, deny or refuse to answer the examiner's questions. *State v. Lytle*, 715 S.W.2d 910, 915 (Mo. banc 1986). On appeal, the evidence pertaining to the admissibility of appellant's confession is reviewed in the light most favorable to the trial court's ruling. *State v. Debler*, 856 S.W.2d 641, 650 (Mo. banc 1993). Any conflicts in the evidence are for the trial court to resolve, and this Court will defer to the trial court's superior position from which to assess credibility. *Lytle*, 715 S.W.2d at 915.

According to the evidence adduced at the preliminary hearings and at trial, police arrested Simmons at his high school and drove him to the Fenton police headquarters. No questioning occurred at the time of the arrest nor during the journey to police headquarters. Upon arrival, Detectives Knoll, Elia, and Milano took Simmons into an interrogation room. Using a department form, Knoll read Simmons the warnings *Miranda* requires. Simmons initialed the rights on the form, indicating that he understood those rights. Simmons then signed a waiver of the rights the *Miranda* warnings are designed to protect, and the detectives commenced the interrogation. This initial interrogation was not electronically recorded.

The initial interrogation session lasted approximately two hours. At first, Simmons denied any knowledge of the crime. The detectives occasionally raised their voices and moved within close proximity (a foot) of Simmons's face. Knoll told Simmons that he thought Simmons was lying. The detectives also suggested that Simmons's accomplice, Charles Benjamin, had been arrested and was possibly confessing at that moment.

At some point during the interrogation, Lt. Edward Robertson, head of the major case squad, entered the room. He told Simmons that he was facing either the death penalty or life in prison and that is would be in his "best interest" to tell the truth. After Robertson left, Knoll and the other detectives encouraged Simmons to remember what Robertson had said and that it would be better for him to tell the truth.

Eventually, Simmons asked everyone but Detective Knoll to leave the room. Simmons confessed. Simmons then agreed to permit videotaping of his confession. Prior to his videotaped confession, Simmons again received the *Miranda* warnings and again Simmons waived his constitutional rights.

A.

Simmons acknowledges that the officers read him the *Miranda* warnings at least twice, and that each time, he indicated that he understood those rights and waived them. The fact that a defendant is repeatedly read the *Miranda* warnings, and voluntarily waives his rights, weighs in favor of a finding that the defendant voluntarily confessed. *State v. Lytle*, 715 S.W.2d 910 (Mo. 1986). Simmons, however, contends that the detectives conducting the investigation violated these rights by continuing to question him after he had indicated his intent to exercise his right to remain silent.

After receipt of the *Miranda* warnings, "if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 473-474, 86 S.Ct. at 1627. A person has a right under the Fifth Amendment to "cut off questioning" and this right must be scrupulously honored. *Michigan v. Mosley*, 423 U.S. 96, 103, 96 S.Ct. 321, 326, 46 L.Ed.2d 383 91975). The suspect, however, must give "a clear, consistent expression of a desire to remain silent" in order to invoke his rights adequately and cut off questioning. *United States v. Thompson*, 866 F.2d 268, 272 (8th Cir. 1989).

Nowhere in the record is there any direct testimony - from Simmons or anyone else - as to anything Simmons said or did that would constitute a "clear, consistent expression of a desire" to assert his Fifth Amendment rights and remain silent. The bulk of the evidence in the record pertinent to this issue consists of Simmons stating that he understood his rights, that he waived those rights, and that he confessed freely and voluntarily. Because Simmons received and understood the *Miranda* warnings, he also knew and understood that he had the right to stop the interrogation at any time. The record shows without equivocation that among the rights that Simmons initialed and indicated he understood was the following:

> If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

Simmons, although aware of this right, never exercised it. At trial, defense counsel asked Detective Knoll the following questions during cross-examination:

Q. You advised Chris of his rights?

A. Yes, sir, I did.
Q. And you told him that he didn't have to talk to you?
A. Yes, I did.
Q. Did he have any problems - did he say, "I don't want to talk to you?"
A. No.
Q. Did he freely sign those forms?
A. Yes, he did.
Q. And he freely started to talk to you?
A. Yes, he did.
Q. And what did he tell you at first?
A. He said he didn't have any involvement in the crime.
Q. Well, did he terminate the interview at that point in time?
A. No, he did not.

The only evidence Simmons cites in support of his claim is a statement that Detective Knoll made at the beginning of Simmons's videotaped confession. The statement upon which Simmons relies follows an exchange in which Detective Knoll shows Simmons the advice-of-rights form and confirms that the form had been read to him; that Simmons understood it; and that Simmons had initialed and signed the *Miranda* waiver. Detective Knoll then observed that the investigation had been going on for some two hours and said: "During the time all of this [the interrogation] has been going on, you first started off saying you didn't know nothing about this crime, and you didn't want to tell us anything. Is that correct?"

This single, isolated statement hardly establishes that Simmons made a clear, consistent expression of a desire to remain silent. Read in context, Detective Knoll's statement refers to Simmons's initial denial of involvement in the crime, not any assertion of the Fifth Amendment right to remain silent. Furthermore, at trial, when directly asked by the defense whether Simmons ever sought to terminate the questioning,

Defective Knoll denied that Simmons had. Viewing the record as a whole, we find no substantial, credible evidence that Simmons ever asserted his right to terminate the questioning and remain silent.

B.

Simmons also claims that Detective Knoll threatened to use Simmons's silence against him, in violation of his Fifth Amendment rights. Detective Knoll allegedly told Simmons that if he did not tell the truth and confess, Knoll would testify about Simmons denying any involvement in the crime.

As evidence supporting his claim, Simmons points to the following from the deposition of Detective Knoll:

> Question: Did you discuss with [Simmons] in what ways his failure to give a statement could hurt him?
>
> Answer: Well, we just told him that if he chose to lie, which I believed he was, not to tell the truth, that if it went to court then I would get on the stand and I would testify that he sat there during the whole interrogation, and denied his involvement in the case.

This colloquy does not show an intent by Detective Knoll to use Simmons's *silence* against him. Rather, Knoll said that he would use Simmons's *statements* against him - his denials of involvement in the crime. A denial of involvement in the crime is not an invocation of one's right to remain silent. *State v. Pollock*, 603 S.W.2d 614, 620 (Mo. App. 1980); *State v. Burley*, 523 S.W.2d 575, 578 (Mo.App. 1975).

In telling Simmons that he would testify that Simmons

denied involvement in the case, Knoll also indirectly reminded Simmons that anything Simmons said could be used against him in court. Knoll did not mislead Simmons as to the scope of the rights, *Miranda* protects, nor did Knoll's statements infringe Simmons's right to remain silent.

C.

Simmons also contends that he confessed in exchange for a promise of leniency. Simmons claims that the detectives made an implied promise of leniency when they told him that he could possibly face the death penalty and that it would be better for him if he told the truth.

A confession resulting from a direct or indirect promise of leniency is inadmissible. *State v. Chandler*, 605 S.W.2d 100, 116 (Mo. banc 1980). However, officers' statements to a suspect that cooperating is in his or her best interests are not improperly coercive and do not, as a matter of law, render a confession involuntary. *Bannister v. Armontrout*, 4 F.3d 1434, 1440 (8th Cir. 1993); *State v. Klueg*, 781 S.W.2d 133, 136 (Mo.App. 1989); *State v. Wilson*, 755 S.W.2d 707, 709 (Mo.App. 1988); *State v. Dixon*, 655 S.W.2d 547, 556 (Mo.App. 1983). *See also U.S. v. Ruggles*, 70 F.3d 262, 265 (2nd Cir. 1995); *United States v. Ballard*, 586 F.2d 1060, 1063 (5th Cir. 1978) (finding that encouraging a suspect to tell the truth does not, as a matter of law, render the confession involuntary, even where the suspect is only sixteen years old).

There is no indication on this record that the detectives made any promise whatsoever to Simmons. They simply told him that is was in his best interest to tell the truth. Simmons tries to create an implied promise by linking the statements that it would be in his best interest to tell the truth to Robertson's statement that he was possibly facing the death penalty. We find this supposed nexus far too tenuous to support Simmons's

contentions. "If defendant had a hope of leniency, that hope 'springs from the seeds of his own planting [and] is not sufficient to render the resulting confession inadmissible.'" *State v. Schnick*, 819 S.W.2d 330, 336 (Mo. banc 1991).

D.

Simmons also contends that under the totality of the circumstances, his confession must be found involuntary. In determining whether a confession resulted from improper mental coercion, the court considers factors such as age, experience, intelligence, gender, lack of education, infirmity, and unusual susceptibility to coercion, but no one fact is dispositive. *State v. Lytle*, 715 S.W.2d at 915. Simmons reminds the Court that he was 17 years old at the time of the interrogation, a not-too-successful high school student, possessed of a low intelligence quotient and likely did not understand his constitutional rights, despite his assurances to the contrary at the time of the interrogation.

The record shows that authorities interrogated him for nearly two hours. Simmons claims the detectives used impermissibly coercive tactics to wrench a confession from him. Among those coercive tactics were yelling, "getting in his face," and misleading him about whether his accomplice Charlie Benjamin was making a statement implicating him.[1] The totality of these circumstances rendered Simmons's *Miranda* waiver involuntary, he now contends.

Viewing the evidence in the light most favorable to the trial court's decision, we do not find, under the totality of the circumstances, that Simmons was deprived of a free choice to

[1]Simmons also incorporates his prior arguments as evidence of improper police coercion, but we have already found above that the police did not engage in improper activity.

admit, deny or refuse to answer the detectives' charges, nor that he was subjected to such psychological coercion that his will was overborne at the time he confessed. The questioning was not unduly long; it lasted approximately two hours. Although the detectives "got in his face," no detective ever touched Simmons nor was he ever threatened with any physical harm. The detectives made neither promises nor threats. Although Simmons was told he could face the death penalty, such a statement does not constitute a threat but is a permissible observation of the possible consequences of first degree murder. *See, e.g., United States v. Scurlock*, 52 F.3d 531 (5th Cir. 1995) (finding that a truthful, non-coercive statement of the possible penalties an accused faces does not overbear the accused's free will). As for suggesting that his accomplice, Charlie Benjamin, was contemporaneously giving a statement implicating him, this tactic does not, *per se*, render Simmons's confession involuntary. Confessions obtained by falsely leading an accused to believe an accomplice has made statements implicating the accused are admissible. *State v. Flowers*, 592 S.W.2d 167, 169 (Mo. 1979).

We find no error in the trial court's decision to admit Simmons's confession. The points are denied.

V.
Detective Knoll's Testimony

Simmons claims the trial court denied his rights to due process and a fair trial because the trial court allowed Detective Knoll to offer his opinion as to Simmons's truthfulness and to testify as to whether Simmons expressed any remorse for the crime.

A.

On redirect, the prosecutor asked Detective Knoll

whether he believed that the final version of the story that Chris Simmons gave him was "the absolute truth." Simmons's counsel objected to the question on the grounds that the question would invade the province of the jury to determine Simmons's veracity. The prosecutor argued that he was trying to rebut the defense's cross-examination, which sought to establish that Knoll never actually knew what "the absolute truth" was, but rather considered anything Simmons told him to be "the absolute truth" as long as those statements implicated Simmons in the crime. The trial court sustained the objection. The prosecutor rephrased the question, asking:

> Q. Detective, after your investigation of this case, and knowing all the things you now know, do you believe that Chris Simmons told you everything about what he did?

The trial court overruled the defense's objection to the new question, and Detective Knoll responded, "No, I do not."

Despite Simmons's claim to the contrary, the second question and Knoll's answer are not improper comments by Knoll on Simmons's veracity. Knoll's statement focuses on whether he believed there was more Simmons could have said in his confession.

In any event, there is no prejudice. There is ample evidence to support Simmons's conviction. Simmons's own words are sufficiently damning to make Knoll's statements inconsequential.

Moreover, it would make little sense for Knoll to question Simmons's credibility when Simmons's own confession is the strong, nearly impregnable foundation of the state's case. The point is denied.

B.

Simmons also takes issue with Detective Knoll's testimony on redirect that Simmons never said he was sorry. Simmons contends this testimony was irrelevant and immaterial to the issue of guilt, and the trial court abused its discretion in allowing the testimony.

On cross-examination, the defense established through Detective Knoll that Simmons cried on several occasions during his confession. On redirect examination, the prosecutor asked:

> Q. Detective Knoll, I'll ask you again, defense counsel asked you if the Defendant was crying. At any time, did he ever say he was sorry?
>
> A. No, he did not.

In response to an objection, the prosecutor claimed that he addressed the question of Simmons's remorse, or lack thereof, to rebut the possible inference of remorse the jury might have made from the fact that Simmons was crying. The determination of the scope of rebuttal is within the trial court's discretion and, absent an abuse of such discretion, the trial court's decision will not be reversed. *State v. Hamilton*, 892 S.W.2d 371, 379 (Mo.App. 1995).

While it is not clear that the defense raised the issue of remorse by injecting evidence of the defendant's lacrimation, we cannot say that the admission of Knoll's testimony of rebuttal - absent any showing of prejudice and in light of the overwhelming evidence supporting the conviction - rose to the level of an abuse of discretion that requires reversal. The point is denied.

VI.

"Voodoo Man" Testimony

Simmons claims that the trial court erred during the guilt phase in allowing two witnesses to testify regarding Simmons's plans and preparations to steal from and murder a neighborhood resident known as the "voodoo man." This testimony, according to Simmons, constituted evidence of prior bad acts, was not offered for any of the recognized exceptions to the evidentiary rule that excludes evidence of other crimes, and was both irrelevant and highly prejudicial.

A.

The first mention of the "voodoo man" at trial came from Christie Brooks, who testified that Simmons came by her house about five hours prior to the break-in at Shirley Crook's residence and told her that he and two others were going to rob the "voodoo man." Defense counsel did not object to Christie Brooks's testimony and, on appeal, Simmons requests plain error review.

In *State v. Brown*, 912 S.W.2d 278, 284 (Mo. banc 1995), we said:

> [U]nless a claim of plain error facially establishes substantial grounds for believing that "manifest injustice or miscarriage of justice has resulted," this Court will decline to exercise its discretion to review for plain error under Rule 20.20. We will, however, consider related claims of ineffective assistance of counsel for failure to preserve the alleged trial error under the test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Simmons's point does not raise a substantial ground for

finding plain error on its face.

B.

Additional and more detailed testimony regarding the plot to rob the voodoo man arose later in the trial when John Tessmer testified. Defense counsel had filed a motion in limine regarding Tessmer's testimony about the voodoo man, which the trial court overruled. Defense counsel offered a continuing objection to the testimony at trial, which was also overruled.

Tessmer testified that Simmons talked about a plan to murder someone because he wanted "a bunch of money." Simmons told Tessmer he would throw the victim off a bridge and had the "voodoo man" in mind. Simmons discussed the plan with Tessmer three to five times during the early part of September. The voodoo man was always the intended victim whenever Simmons discussed his plan with Tessmer. Simmons also discussed the plan with Tessmer and Charlie Benjamin while at Brian Moomey's house, saying that he wanted to kill someone and "get a bunch of money" by tying them up and throwing them off a bridge or by tying the victim to a tree and getting the victim's bank card.

Tessmer also testified that he observed Simmons making masks out of sweatshirts so the voodoo man would not see their faces. About four days prior to Shirley Crook's murder, Simmons allegedly asked Charlie Benjamin to help them kill somebody, according to Tessmer. Tessmer said that about three days before the murder, he saw ropes and gloves at Simmons's house.

On September 8, Simmons told Tessmer that he wanted to meet him and Charlie Benjamin at Brian Moomey's house at 2:00 a.m. the following morning for the purpose of committing the murder. Tessmer met Simmons at Brian Moomey's house

but did not go with him to Shirley Crook's house. Tessmer did not believe that Simmons was actually intending to rob and murder someone that night. Tessmer also testified that Simmons did not have any weapons, masks, or other equipment with him that night.

The trial court has broad discretion to exclude or admit evidence at trial. This Court will reverse only upon a showing of a clear abuse of discretion. *State v. Parkhurst*, 845 S.W.2d 31 (Mo. banc 1992). A trial court's admission of irrelevant and immaterial evidence, even of other crimes, will not be reversed on appeal absent a showing of prejudice. *State v. Ellis*, 853 S.W.2d 440, 445 (Mo. App. 1993). Tessmer's testimony is not other crimes testimony. It speaks directly to Simmons's motive and the deliberateness of his general plan to steal and murder. On that basis it is admissible. Nevertheless, and assuming for the sake of argument only that Tessmer's testimony should have been excluded, we do not find that is inclusion prejudiced Simmons in light of the other, overwhelming evidence of Simmons's guilt.

This case is not at all like *State v. Sladek*, 835 S.W.2d 308 (Mo. banc 1992), on which Simmons relies. In *Sladek*, it was ***explicitly*** clear that the trier of fact (in that case, the court), relied on the uncharged transgressions to convict Sladek. When sentencing Sladek, the trial court said that the state had a very weak case, that absent the evidence of *Sladek's* uncharged transgressions the trial court would not have found Sladek guilty, and that if the evidence of the uncharged transgressions should not have come in, then Sladek's conviction should be reversed on appeal. *Id.* at 310-11.

In sum, Simmons has made no showing of prejudice that flowed from the testimony of John Tessmer. We find no abuse of discretion on the part of the trial court in overruling the defense's motion in limine and continuing objections at trial

regarding John Tessmer's testimony.

VII.

Improper Closing Argument During Guilt Phase

Simmons assigns error to the trial court's failure to correct the prosecutor's closing argument during the guilt phase. Of the errors claimed, only one was properly preserved for review.

During the guilt phase of the trial, the prosecutor argued:

> The evidence is uncontroverted. Uncontroverted. The evidence of plotting, the evidence of burglary, the evidence of premeditation, the evidence of binding, the evidence of blindfolding, transporting, of murder. I'm going to ask you to go back, and render a verdict of guilty of murder in the first degree. You're never going to get to the other verdict because there was premeditation. This wasn't sudden passion. This wasn't an accident. Premeditation, binding and transporting. Render that verdict ***so we can get on with the rest of the trial***.

Defense counsel objected to the highlighted portion of the argument. The trial court overruled the objection. Simmons claims that the argument improperly refers to the punishment phase of the trial without giving the defense an opportunity to address the argument. Simmons relies on *State v. Maxie*, 513 S.W.2d 338, 345 (Mo. 1974), for the proposition that if punishment is discussed in closing arguments, the discussion should occur in the opening portion of the state's argument so that defense counsel has an opportunity to respond

to that argument. Simmons also contends that the prosecutor's statement is contrary to the instructions of the court because the prosecutor argued that the jury should hurry in its deliberations.

The trial court's ruling will not be overturned absent an abuse of discretion resulting in prejudice to the defendant. *State v. Mahurin*, 799 S.W.2d 840 (Mo. banc 1990). An abuse of discretion exists only where the prosecutor's statements are plainly unwarranted and clearly injurious to the defendant. *Id.*

Reading the prosecutor's statements context, we do not believe that the prosecutor is urging the jury to hurry its deliberations or inviting the jury to consider punishment prematurely. At most, the prosecutor's argument is inartful attempt to summarize the overwhelming and undeniable evidence of guilt. The point is denied.

VIII.

Media Coverage

Simmons contends he was denied due process, a fair trial, and his right to confront witnesses because the trial court allowed cameras in the courtroom to cover the proceedings over Simmons's objection. Simmons claims he was prejudiced because the presence of the cameras may have affected the testimony of the State's witnesses, particularly Shane Knoll and Brian Mooney.

Electronic media coverage of criminal trials does not constitute a *per se* denial of due process. *Chandler v. Florida*, 449 U.S. 560, 574, 101 S.Ct. 802, 809-10, 66 L.Ed.2d 740 (1981). The defendant must produce evidence that the media coverage of his case "had an adverse impact on the trial participants sufficient to constitute a denial of due process." *Id.* at 581, 101 S.Ct. at 813. Simmons has not produced such

evidence nor does his argument offer more than hopeful speculation. The point is denied.

IX.

Disclosure of Witness Arrest Records

Simmons contends he was deprived of a fair trial because the trial court refused to order the disclosure of the arrest records of all of the state's witnesses. As a result, Simmons claims, he could not effectively cross-examine the state's witnesses regarding their biases, prejudices, or motives to lie on the stand.

Rule 25.03 designates certain types of information that the state must disclose to the defendant. If the information sought by the defendant does not fall within any of these categories, the defendant may make a written motion to the court requesting the state to disclose the information under the terms of Rule 25.04. If the court finds the request reasonable, the court will order the state to disclose the information to the extent the court finds it relevant and material to the defendant's case.

In reviewing claims regarding meaningful discovery in a criminal trial, this Court looks to see whether there was a reasonable likelihood that the denial affected the result of the trial. The trial court's refusal to require disclosure will be overturned only if it appears that the trial court abused its discretion to the extent that fundamental unfairness to the defendant resulted. *State v. Mease*, 842 S.W.2d 98, 108 (Mo. banc 1992).

In this case, Simmons requested that the trial court order the state to disclose the prior criminal history or "rape sheets" of all state witnesses. Simmons admits that the trial court

sustained Simmons's motion as to prior convictions,[2] but claims that the court refused to order the state to disclose the "rap sheets" or similar information regarding prior arrests that did not lead to convictions.[3] Simmons sought this information in order to impeach the witnesses' credibility. While generally, one may not impeach a witness's credibility by showing an arrest, investigation or criminal charge that has not resulted in a conviction, a party can use such evidence if the inquiry would demonstrate either (1) a specific interest of the witness; (2) the witnesses's motivation to testify favorably for the state; or (3) that the witness testified with an expectation of leniency. *State v. Wise*, 879 S.W.2d 494 (Mo. banc 1994).[4] Even for such purposes, a witness's arrest record would only be relevant to the extent there are any *pending* charges; past arrests, investigations, or charges would not be relevant to show *present* motivation to testify favorably for the state. *See, e.g., State v.*

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[2]We note that a court order is not necessary to obtain prior convictions as these are required to be disclosed under Rule 25.03(A)(7).

[3]It is not clear what the trial court ordered disclosed in this regard. The trial court initially indicated that it would sustain Simmons's motion. The parties then discussed whether arrest records are discoverable or only prior convictions. The court then told the State "to summarize prior criminal history, but not to provide the original rape sheet." Mr. Crosby, for the defense, argued that the entire rap sheets were discoverable, although not necessarily admissible. The Court responded, "I'll stand on that for now" and called a recess. Upon return, the Court stated that it "had sustained [the motion for disclosure by Court order] as to the prior criminal history." The scope of "criminal history" is never defined.

[4]The state argues that Simmons was not entitled to disclosure because he failed to show that any of the above exceptions apply. This argument puts the cart before the horse. The exceptions address whether such information is admissible, not whether it is discoverable. The entire purpose of discovery of arrest records is to determine whether the witness had a motivation to testify favorably for the state or had an expectation of leniency. Admissibility issues arise only after the defense offers evidence that it found through discovery.

Joiner, 823 S.W.2d 50, 53 (Mo. App. 1991) (distinguishing between the potential relevancy of pending charges and the irrelevancy of past charges).

For the purpose of impeachment, it appears that Brian Moomey is the only witness whose arrest records could have possibly been material or relevant to Simmons's case, assuming, of course, that those records would have revealed any pending charges. The trial court's apparent decision not to require disclosure of Moomey's arrest records is not an abuse of discretion, however, because there is simply no grounds for believing that the non-disclosure had any palpable effect on the outcome of the trial. Simmons confessed to the murder, and thus there was ample evidence of his guilt. As for impeaching Moomey's testimony, the defense established that Moomey had spent time in prison for assault with a weapon, burglary and stealing; that he drank heavily - indeed, admitted passing out almost every night, and that he had told the witness coordinator that he was afraid to testify because "people were investigating [him] for the murder, and the investigator was focusing on [him] as being involved in the death of Shirley Crook." Evidence of other of Moomey's illegal activities could hardly have had a negative impact on the jury's view of his character given what they already knew. Moreover, the record reflects ample opportunity to cross-examine the witnesses, and there is no evidence indicating that a "fundamental unfairness" resulted from the trial court's decision not to require disclosure of Moomey's entire rape sheet. The point is denied.

X.

Reasonable Doubt Instructions

Despite nearly ten years of case law contrary to his position, Simmons doggedly raises the consistently-raised-but-to-date futile chalienge to the validity of instructions based on

MAI-302.04 and 313.30, claiming that the "firmly convinced" language in the instructions lowers the state's burden of proof, thereby depriving Simmons of due process. This Court has upheld the "firmly convinced" language in *State v. Chambers*, 891 S.W.2d 93 (Mo. banc 1994); *State v. Parker*, 886 S.W.2d 908 (Mo. banc 1994); *State v. Williams*, 871 S.W.2d 450 (Mo. banc 1994); *State v. Harris*, 870 S.W.2d 798, 811 (Mo. banc 1994); *State v. Shurn*, 866 S.W.2d 447, 462 (Mo. banc 1993); *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993); *State v. Griffin*, 848 S.W.2d 464, 469 (Mo. banc 1993); *State v. Ervin*, 835 S.W.2d 905, 924 (Mo. banc 1992); *State v. Blankenship*, 830 S.W.2d 1, 13 (Mo. banc 1992); *State v. Twenter*, 818 S.W.2d 623, 634 (Mo. banc 1991); *State v. Waller*, 816 S.W.2d 212 (Mo. banc 1991); *State v. Wacaser*, 794 S.W.2d 190, 195 (Mo. banc 1990); *State v. Murray*, 744 S.W.2d 762, 771 (Mo. banc 1988); *State v. Antwine*, 743 S.W.2d 51, 63 (Mo. banc 1987); *State v. Bowman*, 741 S.W.2d 10, 15 (Mo. banc 1987); *State v. Sandles*, 740 S.W.2d 169, 175 (Mo. banc 1987); and *State v. Guinan*, 732 S.W.2d 174, 178 (Mo. banc 1987). The point is denied.

XI.

Simmons alleges that the trial court erred in overruling his motion to strike the "depravity of mind" aggravating circumstance and in overruling his objection to Instruction 16, which submitted that aggravating circumstance to the jury. Simmons contends that the depravity of mind aggravating circumstance is unconstitutionally vague and that he is entitled to a new sentencing hearing because of its allegedly erroneous use.

The depravity of mind aggravator was submitted to the jury as follows:

> 4. Whether the murder of Shirley Crook involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find:
>
> That the defendant killed Shirley Crook after she was bound by defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life.

This language is similar, in all material respects, to the "depravity of mind" aggravator at issue in *State v. Tokar*, 918 S.W.2d 753, 772 (Mo. banc 1996).[5] In *Tokar*, this Court determined that "the jury was specifically provided guidance on when they could find this aggravating circumstance." This Court has held that language and limiting instructions such as that in this case and in *Tokar* provide sufficiently narrow parameters to guide the jury and that the instruction not constitutionally vague. *Id. State v. Mease*, 842 S.W.2d 98, 113 (Mo. banc 1992), *cert. denied*, 508 U.S. 918, 113 S.Ct. 2363, 124 L.Ed.2d 269 (1993); *Sidebottom v. State*, 781 S.W.2d 791, 799 (Mo. banc 1989), *cert. denied*, 497 U.S. 1032, 110 S.Ct. 3295, 111 L.Ed.2d 804 (1990). The point is denied.

XII.

Rule 29.15 Issues

Simmons's Rule 29.15 motion contains numerous claims of ineffective assistance of trial counsel. We have exercised our discretion not to permit plain error review where

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[5]The only difference is that the aggravator in *Tokar* read "Bound or otherwise rendered helpless."

counsel failed to preserve an alleged error for appellate review and the request for plain error review does not establish substantial grounds of prejudice on its face. Consistent with *State v. Brown*, we have reviewed each of the claims of ineffective assistance carefully and determined that those claims not individually addressed below offer no grounds upon which a reasonable probability of prejudice to Simmons from counsels' acts of failures to act could be founded. Because an individual analysis of these claims would carry no precedential value, they are denied without further discussion. Rule 84.16(b).

To prevail on a claim of ineffective assistance of counsel, the movant must establish by a preponderance of the evidence "that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and that he was prejudiced thereby." *Moore v. State*, 827 S.W.2d 213, 215 (Mo. banc 1992); *Strickland v. Washington*, 466 U.S. 668, 687-89, 104 S.Ct. 2052 2064-65, 80 L.Ed.2d 674 (1984). Prejudice exists where there is a reasonable probability that the outcome of the proceeding would have been different but for counsel's ineffectiveness. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. Where trial counsel decides as a matter of trial strategy to pursue one evidentiary course to the exclusion of another, trial counsel's informed, strategic decisions not to offer certain evidence is not ineffective assistance. *Leisure v. State*, 828 S.W.2d 872, 875 (Mo. banc 1992). A motion court's determination will be overturned on appeal only if it is clearly erroneous. *State v. Whitfield*, 939 S.W.2d 361, 369 (Mo. banc 1997).

A.

Simmons claims that trial counsel was ineffective in failing to object during guilt phase closing argument when the

state said

> Well, in that struggle [with Shirley Crook], [Simmons] won, but in this struggle he's not going to win because this struggle goes beyond what happened on September 9th of 1993. This struggle goes to what goes on every day in society. We have to take a stand and take control of our streets. [They're our] streets, [they're our] homes. If we can't be protected in our homes, we can't be protected anywhere. ***Do you think he wants you protected in your home?***

(Emphasis added.)

Simmons argues that the highlighted portion of the argument constitutes an improper personalization of the crime to the jury. It is, of course, improper for a prosecutor to suggest personal danger to the jurors or their families if the defendant should be acquitted. *State v. Storey*, 901 S.W.2d 886, 901 (Mo. banc 1995); *State v. Santonelli*, 914 S.W.2d 13, 15 (Mo. App. 1995).

The prosecutor's statement is a vague and ill-defined, near-non sequitur. It does not suggest personal harm to the jurors if Simmons is acquitted. In *Storey*, the state asked the jurors to put themselves in the victim's shoes and imagine the crime happening to them. *Storey*, 901 S.W.2d at 901. The prosecutor's statement here is substantially less personal than the argument condemned in *Storey*. Moreover, Simmons makes no showing or reasonable argument that the statement had a decisive effect on the outcome of the trial, given the evidence of Simmons's guilt.

Simons also maintains that the entire argument as set

out above was an argument outside the record to which his counsel should have objected. Simmons does not explain this claim sufficiently well for us to grasp its focus. Nevertheless, assuming that Simmons's argument is that the statement alleges that society's struggle with crime goes on every day, we have previously said that the prosecutor may argue the prevalence of crime in the community and may call on common experience in doing so. *State v. Clemmons*, 753 S.W.2d 901 (Mo. banc 1988).

Simmons goes to assert that the argument is impermissible because prosecutors may not urge a conviction in order to protect community values or deter future lawbreaking. Simmons is incorrect. The state may argue that the jury should send a message that society will not tolerate certain conduct. *State v. Cobb*, 875 S.W.2d 533, 537 (Mo. banc 1994).

B.

Simmons also claims trial counsel was ineffective in failing to object to the prosecutor's guilt-phase argument that "[n]o matter how obviously guilty, he has a right to a fair trial. Folks, he had his day in court. The Judge has taken every precaution." Simmons argues that the statement is an improper comment about the prosecutor's opinion of Simmons's guilt, and that such a statement plays on the jury's susceptibility to believe the prosecutor, suggests the prosecution's possession of undisclosed matters relating to the crime, and undermines the jury's discretion.

The prosecutor may make statements that draw a legitimate inference from the evidence but may not make statements that imply a knowledge of facts not before the jury. *State v. Whitfield*, 837 S.W.2d 503 (Mo.1992). The statement "no matter how obviously guilty" merely suggests that the

evidence adduced at trial supports a finding of guilt; the statement does not suggest knowledge of outside facts, but highlights Simmons's own confession.

Simmons claims ineffective assistance of counsel resulted when the prosecutor referred to him as a "predator" and suggested he possessed an "evil mind" and trial counsel did not object. It is not error for a prosecutor to characterize a defendant and his criminal conduct as long as the evidence supports such a characterization. For example, in *State v. Carson*, 883 S.W.2d 534 (Mo.App.1994), the court did not fault the defense for failing to object to the prosecutor's characterization of the defendant as a "thug and bully." The court observed that the evidence showed that the victim was "jerked back real quick," hit in the back and shoved to the ground. This conduct, the court found, was "the work of a thug and bully." *Id.* at 536.

In this case, a reasonable person could find the deliberate, premeditated murder of Shirley Crook by throwing her from a bridge the work of a predatory person with evil motives. This is simply not a case where the prosecutor ascribed labels to the defendant that were totally unsupported by the evidence, as in *State v. Whitfield*, 837 S.W.2d 503 (Mo.1992) (finding insufficient evidence to label homicide defendant as a "mass murderer" and a "serial killer"), or where the prosecutor injected evidence of unrelated crimes, as in *State v. Burnfin*, 771 S.W.2d 908 (Mo.App.1989). The motion court did not err in overruling Simmons's Rule 29.15 motion on these points relating to guilt phase closing argument.

C.

Simmons claims that his trial counsel was ineffective in failing to investigate and present evidence during the penalty phase relating to abuse Simmons suffered as a child, his alcohol and drug abuse, his mental illness, and threats made by Brian

Moomey to Simmons and his family following Simmons's arrest.

At the crux of Simmons's claim of ineffective assistance of trial counsel is the role of Dr. Daniel Cuneo. The Rule 29.15 hearing record shows that Simmons's counsel employed Dr. Cuneo to complete an evaluation as to Simmons's competency, sanity, and to determine the presence of mitigating factors for use in the penalty phase. Simmons claims that his attorneys' decision not to present evidence of Simmons's physical abuse at the hands of his stepfather, psychological abuse resulting from his bitterly divorced parents, and his own abuse of alcohol and drugs was not an informed decision. Simmons characterizes his attorneys' actions as a failure to investigate and concludes that a strategic decision that is not informed is not a strategic decision at all. Much of Simmons's claim in this regard results from his belief that there was serious miscommunication between his attorneys and Dr. Cuneo. He claims that Dr. Cuneo assumed that the attorneys would provide him all of the relevant evidence necessary to formulate an opinion as to the presence of psychologically-based mitigating circumstances. He also claims that the attorneys assumed that Dr. Cuneo would conduct an independent investigation and would not rely solely on information provided by Simmons's attorneys.

It appears from our review of the record that the attorneys initially believed that absent compelling psychological evidence that might explain Simmons's homicidal behavior, Simmons stood a better chance with the jury if the penalty phase evidence attempted to play on the jury's sympathy and the impact on Simmons's family should he be put the death at the hands of the state. Dr. Cuneo's work--at least as it regarded mitigating circumstances--was designed to determine whether such compelling psychological evidence existed.

The motion court found Simmons's counsel thoroughly

investigated Simmons's background.

> Mr. Crosby [one of the two trial counsel] indicated that he interviewed many individuals in preparation for Movant's defense. He testified that he interviewed one of Movant's counselor's [sic] at school, the principal and the assistant principal of Movant's school, Movant's parents, Movant's grandparents, a cousin, step-brothers, the father of Beth Simmons, Robert Hayes' sister, Joe Tessmer, Christy Brooks and Chris Brown. He indicated that he reviewed the school records of Movant and learned that his grades were not good and that his absenteeism was high and that several times [sic] disciplinary actions was [sic] imposed upon Movant. Mr. Crosby also indicated that he on several occasions spoke with an attorney, Mr. John Counts, who represented Charles Benjamin, a co-defendant in the criminal case.
>
> Mr. Crosby indicated he learned of Movant's use of marijuana and alcohol. He testified that the Movant's involvement in his use of marijuana and alcohol were not considered by him to be significant enough to demonstrate any impact on Movant's state of mind....
>
> Mr. Crosby testified that while Movant was in custody he met with him fifteen to twenty times and averaged one hour per visit. Movant denied to Mr. Crosby that Robert Hayes [movant's stepfather] abused him....
>
> * * * * * *

> Mr. Burton [one of the two trial counsel] testified that he mailed sixty letters to the individuals named by Movant. He testified that he had interviewed Movant four or five times and he interviewed Movant's parents and several of his friends. He testified that he spoke with several of Movant's school teachers and with one former employer through that employer's attorney.

In addition, Dr. Cuneo testified at the Rule 29.15 hearing about his conversations with Simmons's attorneys.

> A. [by Dr. Cuneo, upon cross-examination by the State] They asked me what my perceptions were. One of the things is that they were worried that his history of alcohol and drug abuse may not be helpful. My perceptions of Christopher at that time was he had borderline traits and his accounting to me of the alleged offense, I had stated was quite cold and they felt that if I thought that some of the mitigating factors would be important, i.e., the fact of his possible relationship with Brian Moomey; the fact of calling them Thunder Cats, the fact of having a kiddy gang that very well may have been supporting him although we never had any hard data on that; also the perception that the way he accounted the crime to me, or his accounting of the alleged offense or crime to me was extremely cold and that would not be in his best benefit to have that done. So we talked n I guess we talked for about an hour and hour and a half [sic] on the phone as to whether in fact I should pursue anything else. And they stated no. I called back later

> before trial to see if we wanted to and it was their decision at that point that there were some things that were bad that I could say. The bad that I could say would outweigh what I could say that could be helpful.

The decision not to pursue the psychological evidence was founded on Dr. Cuneo's initial report that identified no compelling mitigating circumstance. The motion court found:

> Mr. Burton outlined his plan for the penalty phase of trial. He indicated that he wanted to counter what the State's evidence was and to appeal to the sympathies of the jury and ensure the jury knew Movant was only seventeen. He intended to present the Movant as one who was liked or loved by his brothers, his mother, his father and Christy Brooks. He also sought the perspective testimony of other friends, school teachers or former employers but learned that none of them could offer anything substantive. In fact, some appeared to be intimidated by the charge pending against Movant and were unwilling to discuss anything positive about him. The plan included the intention to present Movant as a seventeen year old individual who had not yet had the opportunity to develop a series of good deeds but to some extent did do good for one of his age. Another objective was to present some of Movant's family to demonstrate their sorrow in contemplating the possible recommendation of death. Mr. Burton believed that if the jury chose not to like Movant, they may choose to like his family and spare Movant's life for the family's benefit.

* * * * * * *

> Mr. Burton indicated that a decision was made to present no evidence regarding Movant's drug or alcohol use. He testified that he learned there was no alcohol consumed or drugs used at the time of the crime. Mr. Burton also learned of the strained relationship between Movant and his step-father. He indicated he believed that any information regarding this relationship would serve to work against Movant and therefore a decision was made not to present any of that evidence during the mitigation phase.

This strategic decision is made all the more reasonable when one considers--as did the motion court--the testimony offered by Dr. Robert Smith in support of Simmons's position at the Rule 29.15 hearing. After administering a battery of tests to Simmons and his parents and stepfather, and after extensive interviews with Simmons and with persons familiar with Simmons's upbringing, Dr. Smith determined that Simmons had a borderline personality disorder and a schizotypal personality disorder. Missouri juries considering the death penalty have often rejected such testimony as the sort of compelling, psychological mitigating evidence that warrants a life sentence. *See, e.g., State v. Kreutzer*, 928 S.W.2d 854 (Mo. banc 1996) (jury recommends death penalty despite psychological testimony that defendant suffered from post-traumatic stress disorder and borderline personality disorder as a result of past emotional and physical abuse); *State v. Parker*, 886 S.W.2d 908 (Mo. banc 1994) (jury recommended death sentence after mental health expert testified to defendant's borderline personality disorder); and *State v. Duisen*, 428 S.W.2d 169 (Mo. banc 1967) (jury recommended death sentence after hearing evidence that defendant had a schizophrenic reaction of the paranoid type and anti-social behavior). Simmons's

experienced trial counsel, no doubt aware of the likelihood of the success of the psychological evidence, chose a strategy they believed might give Simmons's better chance for a life sentence. That the strategy was not successful does not render its use ineffective assistance of counsel.

Simmons argues that *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), requires the trial counsel to offer mitigating evidence of childhood abuse and severe emotional disturbance when the defendant is youthful. Despite Simmons's claim to the contrary, *Eddings* does not require that such evidence be placed before the jury during the penalty phase. In *Eddings*, the constitutional error was not the failure to put on mitigating evidence but the failure of the sentencing court to consider it. Where trial counsel makes a reasoned decision not to place such evidence before the jury during the penalty phase, *Eddings* does not announce a per se rule mandating the submission of mitigating evidence solely because of a defendant's youth.

The motion court did not clearly err in denying Simmons's claims of ineffective assistance of counsel on this point.

D.

During the penalty phase, Mrs. Crook's husband, Steven, testified:

> But she was terrifically scared of height. It terrifies me to think of her being blindfolded and knowing that she was--because I feel that they would have talked about where they were going, and to be thrown off of a high spot would be really a terrible thing for her to--and then how she would feel about not being home when

I come home. I know that as much pain as she would have been going through, I know she would have been worried about me, and worried about Kim and Randy and her mother. Her mother was ill.

Mrs. Crook's daughter, Kimberly Hawkins said:

Like I said, I have dreams. I dream about how she--how I imagine she felt during all of this, what she thought. I can't imagine what she went through, the terror that she felt. I just--I have a picture in my mind that she can't see, she can't speak, she can't scream out, she can't get her hands on anybody, she's tied up, she's naked. You know, she never wanted to be unclothed. It just tore her down emotionally. Threw her in a van. I just imagine--I can imagine her feelings--you know--I can imagine that--I'm sure they were talking.

I can imagine that she was being pushed over, and the freeness of the air. There's nothing below you, there's nothing holding you up. I can't imagine the terror that she's thinking, what's happening, what's going on, I can't see anything. Then I imagine her hitting the water. Does she know to take a breath? Does she know that's what was going to happen. Then you hit the water, and then you go in. And then if she had a breath that she held, how long could she hold it? Did it hurt? When the water came in, did it hurt?

Mrs. Crook's sister, Purdy Mitchell, read a prayer she had prepared and delivered at the family's first Thanksgiving

after Mrs. Crook's murder.

Dear God, we come together to remember, to celebrate and give thanks. You have given us the gift of each other, and the love we share that you have planted in our hearts. By your gracious hand, we have received all that we have for our love and our hope and faith. We are grateful. We humbly ask you to grant your special graces to our family. May our homes be a place of peace and love and faith. We ask you, Dear God, to protect and bless all of us absent and present, living and dead. We wanted to put something in there that would kind of say Shirley without saying her name. Please bless this food, and bless us who are gathered here. In the name of Jesus, Amen.

Simmons claims his counsel was ineffective in failing to object to this testimony of the victim's family and that this failure resulted in a violation of Simmons's Eighth and Fourteenth Amendment rights.

1.

Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), reversed the holdings of *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), that the Eighth Amendment forbids the admission of victim impact evidence during the penalty phase of a capital trial in every instance. *Payne* expressly limited its holding to victim impact evidence. Because the evidence in *Payne* did not extend to the victim's family's characterizations of and opinions about the crime, the Supreme Court did not reconsider *Booth's* holding that such

evidence likewise violates the Eighth Amendment. *Payne*, 501 U.S. at 830, n. 2, 111 S.Ct. at 2611, n. 2.

The Supreme Court's Eighth Amendment jurisprudence has not beaten an easily-followed path, as the transition from *Booth* to *Gathers* to *Payne* shows. Pre-*Booth* decisions focus the Eighth Amendment inquiry on concerns "that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion" by the jury. *Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231 (1985). *Payne*, authored for the Supreme Court by Chief Justice Rehnquist, seems to reject Eighth Amendment concerns about reliability expressed in *Caldwell*, at least as to matters of evidence introduced at the sentencing phase. *Payne* adopts the view of then-Justice Rehnquist's *Caldwell* dissent that "there is no [Eighth Amendment] requirement that all information received by a sentencing jury be 'relevant.' " *Id.* at 351, 105 S.Ct. at 2651 (Rehnquist, J., dissenting).

Thus, it appears that post-*Payne*-Eighth-Amendment analysis applies to those situations in which penalty phase procedures operate to diminish the jury's sense of responsibility for its decision to impose death, *Caldwell*, or where the sentencer's discretion is not "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Zant v. Stephens*, 462 U.S. 862, 874, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235 (1983). After *Payne*, reliability concerns that attach to matters of evidence during the penalty phase are considered under a due process rubric. "In the event that evidence is introduced that is so unduly prejudicial that it renders that trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne*, 501 U.S. at 825, 111 S.Ct. at 2608. Simmons's Eighth Amendment argument is denied.

2.

Simmons claims that counsels' alleged ineffectiveness resulted in a violation of his right to due process. The test of a due process violation, as the preceding paragraph notes, is whether the evidence is so prejudicial that it renders the trial fundamentally unfair.

The evidence in this case did not offend the due process clause. Though an Eighth Amendment case, *Payne* makes clear that "there is nothing unfair about allowing a jury to bear in mind that harm [the defendant's acts had caused] at the same time as it considers the mitigating evidence introduced by the defendant." *Id.* at 826, 111 S.Ct. at 2609.

It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant ... without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.

Id., quoting State v. Payne, 791 S.W.2d 10, 19 (Tenn.1990). Moreover, Justice O'Connor's concurring opinion suggests that in light of "the jury's unavoidable familiarity with the facts [of the murder]," witness testimony at the sentencing phase describing the loss suffered by the victim's family does not violate due process where the statements of the witnesses do not inflame the passions of the jury beyond the passion that the facts of the crime itself inflames. *Payne*, 501 U.S. at 832, 111 S.Ct. at 2612 (O'Connor, J., concurring).

Steven Crook spoke about his wife's fear of heights and the terror that she must have felt. No one doubts that the jurors were moved by this testimony. But the jurors had already heard from Christopher Simmons himself about her abduction; the way she was bound; the manner in which she was thrown into the minivan; her struggle to free herself; Simmons's use of her

own clothing and personal items to hog tie her; his decision to use duct tape to cover her face, restrict her breathing, and blind her. The jury would have known that she knew she was on railroad tracks because she had freed herself earlier and realized that a trestle lay ahead. As human beings, the jurors would have imagined the scene and felt what Shirley Crook felt as she struggled and fought for breath and was thrown and fell to her death. We doubt that Steven Crook could inflame the jurors more than Christopher Simmons did in his confession of the murder.

Kimberly Hawkins's testimony described the impact of the manner of her mother's death on her. She did not describe the crime. She described the nightmares that came to her as part of her description (not fully set out in this opinion) of the broad impact her mother's murder had on her ability to work and rest and enjoy life. This, too, would have affected the jury. But this is "evidence of the specific harm caused by the defendant." *Payne*, 501 U.S. at 825, 111 S.Ct. at 2608. In this case, it is also evidence that balances the mitigation evidence put on by Simmons at the penalty phase--that his death at the hand of the state would injure his family. " '[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.' " *Payne*, 501 U.S. at 827, 111 S.Ct. at 2609, *quoting Snyder v. Massachusetts*, 291 U.S. 97, 122, 54 S.Ct. 330, 338, 78 L.Ed. 674 (1934).

Likewise, Purdy Mitchell's testimony spoke of the Shirley Crooks family's loss. This, too, is harm caused by the murder of which the jury may know. We do not find that her reading of the prayer rendered the sentencing phase of the trial fundamentally unfair when considered in the context of the statutory and nonstatutory mitigating and aggravating statutory circumstances presented by both parties during the penalty phase.

The motion court did not err in overruling the Rule 29.15 motion on these points.

E.

During the penalty phase closing argument, defense counsel argued

> I'll submit to you this: If you, as you sit here today, say to yourself, "You know, as far as Chris Simmons is concerned, the State's right; who cares about age; who cares about no significant history; who cares about the deeds he's done." You basically may say to yourself, "I don't care about Chris Simmons at all," and I'm not at all saying to you that that's the feeling you should have. You've heard all the good things that were said about a seventeen year old kid. Ladies and gentlemen of the jury, if, in fact, you do feel that way about Chris Simmons, then I'm not asking you here to render a life sentence for this kid over here. I'm asking you to give a life sentence for his family. Family and friends that basically have indicated to you, and shown you that a life sentence that you render is not the same in their eyes as the death penalty.
>
> Now, there's no question the State will come up here and say, "Well, you know, Chris Simmons is the one that did everything to his family." Don't you feel responsible for that situation, ladies and gentlemen of the jury, but all I'm saying to you is consider his family. Consider his brothers. Consider the fact that just the fact that he's alive makes a difference to some people, and that, ladies and gentlemen of

> the jury, is certainly a mitigating circumstance that you should consider.

In response, the state's counsel argued

> Look at what his friends and family told you. Isn't that scary? Look at how he repaid their love. Look at what he's done to them, and they're asking you to spare his life so he can remain in prison as a constant reminder to them of the acts he did on that night. Show some mercy to his family, give him death. Look at his family. Look at his little brother. Kenny said it all. Someday I want to grow up to be just like him. To be just like him. Spare those kids of that.

Simmons's counsel did not object. Simmons insists this is ineffective assistance of counsel and contends that this argument offends the due process clause as interpreted by the Eighth Circuit's decision in *Antwine v. Delo*, 54 F.3d 1357 (8th Cir.1995). The state says that the prosecutor's words are acceptable retaliation. Both arguments are incorrect.

Although we doubt the rectitude of the Eighth Circuit's due process conclusions in Antwine,[6] the application of that court's due process analysis in this case does not lead to a reversal.

In *Antwine*, the state's lawyer argued that (1) the death by gas chamber was instantaneous, (2) that the taxpayers of the state ought not be required to support Antwine for "the next 50 years" in prison, and (3) it would be more humane to put

[6]*See Antwine v. State*, 791 S.W.2d 403 (Mo. banc 1990).

Antwine to death "so that his brother can get on with his life, and so that the two children can get on with their lives" than to require them to think about their brother/father in prison every day. *Id.* at 1362- 3. The Eighth Circuit found it constitutionally significant that death by cyanide inhalation was not instantaneous and, as a result, the state's first comment diminished the jury's sense of responsibility by assuring Antwine a quick and easy death. "On this basis [the Eighth Amendment] alone, we hold that Antwine's sentence is constitutionally invalid." *Id.* at 1362.

After announcing this sufficient basis for its holding, a "separate basis for our holding" follows. *Id.* at 1364. The Eighth Circuit characterized the additional issue it addressed as whether the latter two comments (summarized in the preceding paragraph), "***combined with*** the misleading and unsupported description of instantaneous death, were prejudicial enough to render the entire sentencing proceeding fundamentally unfair and a violation of Antwine's right to due process." (Emphasis added.) *Id.* at 1363.

Continuing, *Antwine* embraced a due process analysis that requires consideration of four factors.

> We must: (1) measure the type of prejudice that arose from the argument; (2) examine what defense counsel did in his argument to minimize the prejudice; (3) review jury instructions to see if the jury was properly instructed; and (4) determine it there is a reasonable probability that the outcome of the sentencing phase would have been different, taking into account all of the aggravating and mitigating circumstances.

Id. at 1363.

Under the *Antwine* rubric, the state's comment was improper--even as retaliation--because " 'it does not reflect the properly considered circumstances of the crime or the character of the individual.' " *Antwine*, 54 F.3d at 1364, *quoting Blair*, 916 F.2d 1310, 1323 (8th Cir.1990). Using the Eighth Circuit's language, the state's comment here was also "prejudicial,"[7] but not necessarily outcome determinative.[8]

It does not follow, however, that the state's comment requires a reversal of the death sentence. First, it is the combination of the instantaneous death argument--an Eighth Amendment violation--with the economic burden argument that offends the Eighth Circuit's constitutional sensibilities. In reaching its "separate basis" for reversal of the death sentence in *Antwine*, the court said

> There is no doubt that Antwine killed Eric "George" Jones in the police holding cell, but the two aggravating circumstances presented to the jury were balanced by some nonstatutory mitigating circumstances that could have led the jury to choose life imprisonment ***if the prosecutor had not fed their fears of economic burden while easing their conscience with the idea of a quick, humane death."***

(Emphasis added.) Contrary to Simmons's assertion, *Antwine* does not rest on the state's comments about the defendant's family.

Second, we apply *Antwine's* four-stepped due process inquiry. (1) The state's challenged comment did not diminish the jury's sense of responsibility in imposing the death sentence. The state's argument focused the jury on the harsh reality of a death sentence on Simmons's family. This is the ground upon which defense counsel's strategy asked that the debate take place. That the state had a contrary view of what was best for the family did not diminish the jury's sense of the stark choice it faced. In fact, it heightened it. (2) Defense counsel raised the issue of the impact of the death sentence on Simmons's family initially in an attempt to persuade the jury that the family would suffer if the defendant died at the state's hand. The state's counterpoint must be read against Simmons's counsel's argument. When that is done, one cannot say that the jury deliberated without the benefit of a balanced argument. (3) The jury received instructions that reminded it that argument is not evidence. And as to the state's argument about what would be best for Simmons's family, nothing the state said could be misconstrued by the jury as factual evidence. The argument condemned in *Antwine* alluded to a factual basis for the belief that incarceration for life held an economic burden for taxpayers that the death penalty would relieve. (4) We find no reasonable probability that the jury would have reached a different decision on punishment if the state had not said the words Simmons now challenges. The state's argument falls into the *Blair* exception--constitutional foul without constitutional harm. In our parlance, we conclude that no prejudice to defendant resulted from the state's argument.

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[7]This Court, however, has reserved use of the word "prejudicial" to mean outcome determinative. "Prejudicial" as we use it means a conclusion that trial error results in a reasonable likelihood that the jury would have reached a different result in the absence of the error. *State v. Parker*, 856 S.W.2d 331, 333 (Mo. banc 1993).

[8]*See Antwine*, 54 F.3d at 1363. ("[W]e found no due process violation when the prosecutor made a single, brief comment, even though that comment was so improper and prejudicial that we had 'no hesitation in condemning [it],' " *quoting Blair*, 916 F.2d at 1323.

F.

During the penalty phase closing argument, the prosecutor said:

> Now, the Defendant is [sic] offered certain mitigating circumstances. The Court has instructed you that once you find those aggravating circumstances, which you have to find beyond any doubt--the evidence is overwhelming--that's a given--do those mitigating circumstances outweigh the four aggravating circumstances of what the Defendant has done to the victim and her family? You saw two stark contrasts this morning between the two families obviously in pain.
>
> There's one huge, enormous difference. His witnesses had to look at him when they testified. His witnesses get to visit him whether it's on Wednesdays or Sundays. His witnesses still have him. Shirley's don't. They don't have Wednesday visitation. They don't have Sunday visitation, and they certainly couldn't look at her in the courtroom. That's their cross that they are bearing. That's his choice. ***He chose the evidence that you are going to hear in this case. He chose it.***

(Emphasis added.) Simmons asserts that the emphasized portion of the argument (the only portion Simmons's brief quotes) is a prejudicial, indirect comment on his decision not to testify in the case, a violation of the Fifth and Fourteenth Amendment right to remain silent. Defense counsel did not object. Was this ineffective assistance, as Simmons claims?

We do not read the prosecutor's statement as a comment on Simmons's failure to testify. Read in context, the prosecutor's statement reflects a belief that Simmons chose to murder Shirley Crook and to do so in the manner in which he did. The prosecutor's argument places the blame for the pain and loss that both Simmons's family and the Crook family bore on Simmons's decision to commit murder. We find no intent to speak to Simmons's failure to testify in the state's argument, and thus no error. Therefore, counsel cannot be ineffective where the state's argument conformed to the law.

XIII.

Section 565.035.3 Review

Section 565.035.3, RSMo, requires this Court to determine

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.

A.

Simmons claims that the death penalty recommended by the jury and imposed by the trial court in this case was the result

of the influence of passion, prejudice, or arbitrary factors. He claims that the victim impact evidence, the prosecutor's closing argument, and the prosecutor's alleged assertion that Simmons's age was an aggravating and not a mitigating factor all require a reversal of the death penalty. We have previously considered these claims. They are without merit.

In addition, Simmons's now claims that the jury's inability to hear evidence of his child abuse, psychological and emotional damage, drug and alcohol addiction, and his relationship with the felon, Brian Moomey, rendered the imposition of the death penalty arbitrary. We have previously determined that Simmons's counsels' decision not to focus on this evidence during the penalty phase was a reasonable strategic decision. Section 565.035.3 review does not require reversal of the death sentence because a reasonable strategic decision does not result in the outcome the defendant prefers.

B.

Simmons contends that the evidence is insufficient to support the jury's finding of the statutory aggravating circumstances. He bases this argument on the grounds that his confession was illegally obtained. Absent the confession, there would be no evidence that he had murdered Shirley Crook either for pecuniary gain or to avoid lawful arrest. As discussed previously, Simmons's confession was not illegally obtained. Thus, there was ample evidence to support finding the two statutory aggravators in question.

As to the depravity of mind aggravator, Simmons again contends that this is unconstitutionally vague. Again, as we previously determined, the aggravator was not unconstitutionally vague and there was ample evidence to find that Simmons killed Shirley Crook after she had been bound. Simmons's arguments are meritless.

C.

Simmons claims that this Court's practice of proportionality review violates due process. This Court rejected a similar claim recently in *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993), *cert. denied*, 511 U.S. 1078, 114 S.Ct. 1664, 128 L.Ed.2d 380 (1994). The point is denied.

D.

Simmons next claims that the imposition of the death penalty is arbitrary because it is the product of unrestricted prosecutorial discretion. This Court rejected a similar argument in *State v. McMillin*, 783 S.W.2d 82 (Mo. banc 1990), *cert. denied*, 498 U.S. 881, 111 S.Ct. 225, 112 L.Ed.2d 179 (1990). We continue to adhere to the views expressed in *McMillin*.

E.

Simmons also claims that Missouri's death penalty statute achieves no legitimate governmental goal and is therefore excessive. This Court rejected this argument is *State v. Newlon*, 627 S.W.2d 606 (Mo. banc 1982), *cert. denied*, 459 U.S. 884, 103 S.Ct. 185, 74 L.Ed.2d 149, *reh'g denied*, 459 U.S. 1024, 103 S.Ct. 391, 74 L.Ed.2d 520 (1982). The point is denied.

F.

Proportionality

In considering whether the death sentence imposed in this case is proportionate, we consider the death sentence imposed in other cases. The jury found three aggravating circumstances: that Simmons committed the murder for pecuniary gain, section 565.032.2(4); that Simmons committed

the murder to avoid a lawful arrest, section 565.032.2(10); and that the murder involved depravity of the mind.

Where a murder has been committed for pecuniary gain and/or for the purpose of avoiding identification of the defendant by the victim, this Court has upheld the death sentence in *State v. Copeland*, 928 S.W.2d 828 (Mo. banc 1996); *State v. Kreutzer*, 928 S.W.2d 854 (Mo. banc 1996); *State v. Nunley*, 923 S.W.2d 911 (Mo. banc 1996); *State v. Weaver*, 912 S.W.2d 499 (Mo. banc 1995); and at least six other cases. In *State v. Tokar*, 918 S.W.2d 753 (Mo. banc 1996), the death penalty was recommended where the defendant exhibited depravity of mind by killing the victim while the victim had been bound. *See also State v. Oxford*, 791 S.W.2d 396, 402 (Mo.1990) (finding depravity of mind where the murder victim was bound and gagged with duct tape and beaten.) The death penalty has also been given in cases involving youthful offenders. *State v. Wilkins*, 736 S.W.2d 409 (Mo. banc 1987), and *State v. Richardson*, 923 S.W.2d 301 (Mo. banc 1996).

The death penalty imposed in this case is proportionate to the sentence imposed in similar cases. The point is denied.

XIV.

The judgment of guilt of first degree murder, the sentence of death and the judgment overruling the defendant's Rule 29.15 motion are affirmed.

All concur.

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel. CHRISTOPHER SIMMONS,	)
Petitioner,	)
vs.	) **No.**
	) **DEATH PENALTY**
AL LUEBBERS, Superintendent, Potosi Correctional Center,	) **CASE EXECUTION**
	)**SCHEDULED: JUNE 5,**
	)**2002 12:01 A.M.**
Respondent.	)

WRIT SUMMARY

Identity of the parties and their attorneys in the underlying action, if any: none.

Nature of underlying action, if any: none.

Action of Respondent being challenged, including date thereof: Petitioner challenges Respondent's illegal detention of Petitioner under sentence of death. Such illegal detention began in 1994 and is continuing.

Relief sought by Relator or Petitioner: Petitioner request that his unlawful sentence of death be vacated.

Date case set for trial, if set, and date of any other event bearing upon relief sought (e.g., date of deposition or motion hearing): Petitioner is scheduled to be executed on June 5, 2002 at 12:01 a.m.

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel. CHRISTOPHER SIMMONS,	)
Petitioner,	)
vs.	) **No.**
	) **DEATH PENALTY**
AL LUEBBERS, Superintendent, Potosi Correctional Center,	) **CASE EXECUTION**))**SCHEDULED: JUNE)5, 2002 12:01 A.M.**
Respondent.	)

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW petitioner, Christopher Simmons, by and through counsel, Patrick J. Berrigan and Jennifer Brewer, and moves this Court pursuant to Rule 91 to issue its Writ of Habeas Corpus in this case granting relief to Mr. Simmons from his unconstitutional sentence of death. In support of his petition, Mr. Simmons states as follows:

FACTUAL BACKGROUND

1. Petitioner Christopher Simmons is currently confined by Al Luebbers, Superintendent, at Potosi Correctional Center, under sentence of death. (See attached warrant of execution) Following conviction for first degree murder and recommendation of a sentence of death by a Jefferson County, Missouri jury, the court sentenced Mr. Simmons to death on August 19, 1994.

2. Christopher Simmons' attorney filed an amended petition for postconviction relief with the motion court on March 24, 1995. Following an evidentiary hearing, the court denied the postconviction relief motion on January 3, 1996. Mr. Simmons filed a notice of appeal with the Missouri Supreme Court on February 7, 1996. This Court affirmed the conviction and sentence in ***State of Missouri v. Christopher Simmons***, 944 S.W.2d 165 (Mo. 1997). A motion for rehearing was denied on May 27, 1997. Mr. Simmons then petitioned the United States Supreme Court for certiorari on July 2, 1997. The Court denied the petition on November 3, 1997 in ***Simmons v. Missouri***, 118 S.Ct. 376 (1997).

3. Mr. Simmons filed his petition for writ of habeas corpus in the United States District Court, Eastern District of Missouri, on July 15, 1998. The petition was denied in two parts, first on March 24, 1999, and finally on August 5, 1999. A motion to alter or amend the district court's March 24, 1999 judgment was denied on August 5, 1999. A motion to alter or amend the August 5, 1999 judgment was denied on September 28, 1999.

4. On September 7, 1999, Mr. Simmons filed a notice of appeal with the Eighth Circuit Court of Appeals. Following briefing and oral argument, the Eighth Circuit denied the appeal on January 2, 2001. On February 22, 2001, Mr. Simmons' petition for rehearing and for rehearing en banc was denied. Chief Judge Wollman, Judge McMillian, and Judge Richard S. Arnold would have granted the petition.

5. On July 26, 2001, Mr. Simmons filed a Petition for Writ of Certiorari with the United States Supreme Court. That petition was denied on October 1, 2001. Application for rehearing of the petition was denied on February 19, 2002.

6. On April 2, 2002, the Missouri Supreme Court set an

execution date of May 1, 2002. On April 24, 2002, the Missouri Supreme Court postponed the execution date to June 5, 2002. A clemency petition is currently pending with Governor Bob Holden. No other pleadings are currently pending.

7. Christopher Simmons' restraint is illegal and improper because such restraint violates the Eighth Amendment to the United States Constitution and Article I, §21 of the Missouri Constitution, which prohibit cruel and unusual punishment; and the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §10 of the Missouri Constitution, which guarantee due process of law, in that these provisions prohibit the execution of any juvenile under eighteen years of age. No petition for the relief sought here has been made to any higher court than this Court.

SUGGESTION IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

CHRISTOPHER SIMMONS' SENTENCE OF DEATH VIOLATES THE EIGHTH AMENDMENT AND ARTICLE I, §21 OF THE MISSOURI CONSTITUTION'S BAN ON CRUEL AND UNUSUAL PUNISHMENT, AND THE DUE PROCESS CLAUSE OF THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, §10 OF THE MISSOURI CONSTITUTION, IN THAT A NATIONAL CONSENSUS, THE EVOLVING STANDARDS OF DECENCY AND THE DOCTRINE OF JUS COGENS NOW EXIST THAT EXPRESSLY FORBID EXECUTION OF JUVENILE OFFENDERS.

I. Evolving Standards of Decency Have Made the Execution of Juvenile Offenders Contrary to the Eighth Amendment

In ***Stanford v. Kentucky***, 492 U.S. 361, 380 (1989) (plurality opinion), the Court considered the constitutionality of the juvenile death penalty and concluded: "We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age." In the thirteen years since ***Stanford***, such consensus has developed. This is evidenced by the emerging "pattern of federal and state laws" towards abolition of the juvenile death penalty, by a growing and uncontroverted body of research providing that a juvenile's brain development is significantly undeveloped as compared to the adult brain, and by the number of respected organizations that have taken a stance against the juvenile death penalty.

A. The emerging "pattern of federal and state laws" favors the abolition of the death penalty for those under the age of eighteen

In ***Stanford***, the Court concluded that when assessing contemporary standards of decency a primary consideration should be "the pattern of federal and state laws." ***Id.*** at 373. Since ***Stanford***, Montana and Washington have both banned the execution of juvenile offenders. Most recently, in just March of this year, Indiana passed a law banning the execution of juvenile offenders. This brings the total to ***twenty-eight*** states that disallow the death penalty as an option for juvenile offenders. In addition, the federal government's 1994 federal death penalty act set the minimum age for death penalty eligibility at 18.

Every other legal trend in this area reflects a growing

rejection of the death penalty for those under eighteen. This year, six states (in addition to Indiana) are considering or have considered legislation to bar the juvenile death penalty – Missouri, Kentucky, Mississippi, Arizona, Pennsylvania, Florida. Kentucky Governor Paul Patton said he would support the bill banning the execution of juveniles. The Florida senate passed the bill 34-0. Although not compelled to do so by law, Virginia overturned the death sentence of its only juvenile on death row within the last year. Furthermore, the reversal rate for death sentences imposed on juvenile offenders is 89%, and juvenile death sentences have dropped to only 2.7% of the total number of death sentences imposed in the United States since 1973.

In addition to the legal trends, public policy shows the nation's "evolving standards of decency" have come to oppose the juvenile death penalty. In a 1994 study, only 35% of death-qualified mock jurors were willing to sentence 17-year-old defendants with the death penalty. A 2001 National Opinion Research Center study showed that 62% support the death penalty, but only 34% favor it for those committing murder when under the age of 18. In looking exclusively at the Midwest, the study revealed that only 31.5% favored the juvenile death penalty. Indeed, with Indiana's recent statute repealing the death penalty for juveniles, Missouri is the lone Midwestern state with the juvenile death penalty on its books.

B. Scientific Research Supports the Notion That Juveniles Do Not Have the Requisite Culpability to be Eligible for the Death Penalty

By their very nature, teenagers are less mature, and therefore less culpable, than adults who commit similar acts but have no such explanation for their conduct. Adolescence is a transitional period of life when cognitive abilities, emotions, judgment, impulse control, identity - even the brain - are still

developing. Over the last five years, neuroscientific research has discovered that the adolescent brain is in fact far less finished than previously believed. One of the last parts of the brain to mature, the prefrontal cortex, is that part which controls the making of sound judgments and the calming of unruly emotions. At the same time, the part of the brain where raw emotions such as anger are generated, is entering a stage of development that pushes it into overdrive.[1]

The prefrontal cortex is the supervisor of our brain. It enable us to regulate our thoughts and to decide whether to cultivate or dismiss them. It plans, strategizes, and envisions consequences. Abnormalities in the frontal lobe of adult brains are associated with adults who commit murder. It is the prefrontal cortex in "normal" adults that recognizes our violent thoughts and then dismisses them as wrong without acting on them. Unfortunately, this is the part of the brain that undergoes more change during adolescence than any other part of the brain.[2] As a result, adolescents do not have the capacity to use the prefrontal cortex nearly as much as the amygdala, the more emotional and aggressive part of the brain. Even the most sophisticated-appearing teenagers rely heavily on this emotional part of the brain, as MRI scans have shown.[3] In short, what we know now that we did not know at the time of ***Stanford*** is that adolescents do not have the same ability as the rest of us to

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[1]*See* Brownless, Shannon. "Inside the teen brain: Behavior can be baffling when young minds are taking shape." *Lewis-Clark State College*. Undated.

[2]Giedd, Jay. Interview with Public Broadcasting Services. *See* www.pbs.org/wgbh/Pages/frontline/shows/teenbrain/interviews/giedd.html.

[3]Yurgelun-Todd, Deborah. Interview with Public Broadcasting Services. *See* www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/nelson.html.

think about their thoughts, to judge them as right or wrong, and to stop them from guiding their behavior.

The adolescent's biological inability to control his actions is highly significant in the consideration of whether the death penalty is an appropriate punishment for juvenile offenders. One well-grounded principle of death penalty law holds "that punishment should be directly related to the personal culpability of the criminal defense." ***California v. Brown***, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). Courts have long accepted the fact that adolescents are less mature and responsible than adults, and that therefore, less culpability should attach to a crime committed by a juvenile rather than an adult. *See* ***Thompson v. Oklahoma***, 487 U.S. 815, 834-35 (1988) (Stevens, J., plurality opinion). Scientific proof now exists to support this proposition. That proof demonstrates that this crucial brain development is continuing when the juvenile is 16 or 17 years old. Therefore, because juveniles under the age of 18 are, in fact, not capable of being as culpable as adults are, their execution violates due process and the prohibition against cruel and unusual punishment.

C. Missouri Laws Recognize that Juveniles Are Not Able to Handle the Responsibilities and Rights of Adults

Missouri recognizes the need for restricting the rights of the "less mature and responsible" juveniles throughout its constitution and statutory scheme. For example, Article VIII, §2, of the Missouri Constitution provides that Missourians must be 18 years old before they are granted the right to vote. Likewise, Missouri citizens must be 21 years old before they can serve on a jury. Ironically, this means that, by law, not one member of the jury that convicted Chris and sentenced him to death cold have been a "jury of his peers." Our State's increasing recognition of the need to protect our juveniles was

most recently seen in the drivers' licenses' statutes. The state originally granted the privilege to drive at the age of sixteen. Effective January 1, 2001, a new statute was put in place, allowing children between the ages of sixteen and eighteen to obtain only an "intermediate driver's license." Among other things, the "intermediate licence" requires that the juvenile have a permit for 6 months before the license can be obtained, and verification of at least 20 hours of supervised driving experience under this permit. Once the "intermediate license" is issued, the juvenile is still not allowed to drive between 1 a.m. and 5 a.m. until he turns 18 and gets his ordinary driver's license.

Other examples of Missouri statutes that seek to protect our children by restricting their rights are the marriage license statute, which requires parental consent to obtain a license for children under 18; the pornography statute that makes it a crime to distribute pornography to minors under the age of 18; and the state lottery statute that prohibits the sale of tickets to anyone under the age of 18. Finally, Missouri's refusal to give children the right to consume alcohol or to purchase tobacco, are probably the clearest examples of our recognition that juveniles are not capable of acting with the same maturity and responsibility as adults. The State's clear and continuing recognition of the need to protect juveniles by restricting their rights, combined with the evolving standards of decency of our society as a whole, compels the conclusion that the execution of juveniles now runs afoul of the Eighth Amendment and Article I, §21 of the Missouri Constitution prohibiting cruel and unusual punishment. Any other conclusion is inconsistent with every other aspect of Missouri law.

D. The Juvenile Death Penalty is Uniformly Rejected by Children's Organizations Throughout the United States.

A number of organizations such as the American Bar Association, the Child Welfare League of America, the Children's Defense Fund, the National Center for Youth Law, the Juvenile Law Center, the Coalition for Juvenile Justice, the American Society for Adolescent Psychiatry, the American Academy for Child and Adolescent Psychiatry, the American Psychiatric Association, and the National Mental Health Association urge that the execution for a crime committed while a juvenile is simply unacceptable in a civilized society. This recognition by such respected organizations in our society speaks volumes as to how the standards of decency in our nation have evolved. *See* ***Stanford***, 492 U.S. at 388 ("Further indicators of contemporary standards of decency that should inform our consideration of the Eighth Amendment question are the opinions of respected organizations." (Brennan, J., dissenting).

II. The Application of Capital Punishment to Juveniles is Anathema to Principles of International Law and is Forbidden by the Principle of *Jus Cogens*.

In continuing to execute juvenile offenders, the United States acts in defiance of substantial international consensus and law. Indeed, such executions have all but ended around the world, except in the United States. In the last decade, the United States has executed more juvenile offenders than all of the world's nations combined. The only other countries that still execute juveniles are Iran, the Democratic Republic of Congo and the United States (China, Yemen and Pakistan have recently abolished the use of capital punishment for juveniles). Furthermore, just this past year, Iran stated that it no longer executes juvenile offenders, while the leader of the Democratic Republic of Congo commuted the death sentences of four juvenile offenders.

The death penalty for juvenile offenders is expressly

prohibited by the International Covenant on Civil and Political Rights (ICCPR), the U.N. Convention in the Rights of the Child (CRC), and the American Convention of Human Rights. This overwhelming tide of international sentiment against juvenile executions is highly relevant to the issue. ***Stanford v. Kentucky***, 492 U.S. at 389. ("Our cases recognize that objective indicators of contemporary standards in the form of legislation in other countries is also of relevance to Eighth Amendment analysis." (Brennan, J., dissenting).

Since the end of World War II, the death penalty for juvenile offenders has been expressly prohibited by numerous international norms, such as the provisions of the International Covenant on Civil and Political Rights ("ICCPR"),[4] the United Nations Convention on the Rights of the Child[5] and several other international agreements and treaties.[6] In ratifying the ICCPR, the U.S. Senate passed a resolution containing a "reservation" purporting to nullify the exclusions of juveniles from the death penalty. But the existence of such an international law norm is now incontrovertible and undeniable. Indeed, numerous sovereign governments, including Sweden, The Netherlands, Finland, Germany, Denmark, Norway, France,

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[4]Article 6(5), Dec. 19, 1966 6 I.L.M. 368, 370 (entered into force Mr. 23, 1976) ("Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age. . .").

[5]Article 37(a), G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. No. 16 at 19, U.N. Doc. A/4354 (1959) ("Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age").

[6]See, e.g. American Convention on Human Rights, Article 4(5), Nov. 22, 1969, I.L.M. 673, 676 (entered into force July 18, 1978) ("Capital punishment shall not be imposed upon persons who, at the time of the crime was committed, were under eighteen years of age. . ."). The United States signed, but never ratified , the American Convention.

Italy, Portugal, Belgium and Spain, filed "objections" to the U.S. reservation, in that the reservation was diametrically opposed to the object and purpose of the Covenant itself.[7]

The prohibition on the execution of juvenile offenders is most clearly embodied in the Convention on the Rights of the Child, a multilateral treaty which the President of the United States has signed without reservation and which every organized nation in the world, except the United States, has ratified. It is also expressed in three other multilateral treaties the United States has ratified, including the ICCPR. This norm has been expressed or agreed to by every competent international body. It is followed by almost every other nation in the world, excluding the United States.

Almost every other country in the world adheres to one or more treaties forbidding juvenile executions. Therefore, a norm of *jus cogens* forbidding the capital punishment of juveniles may resolve differences between international law and those state jurisdictions that still subscribe to capital punishment of juveniles. *Jus cogens* is a principle that shapes and limits the legislative powers of sovereign nation-states. In particular, the principle restrains nations from transgressing upon those interests deemed based and fundamental to the international order. Accordingly, *jus cogens* norms protect the most compelling and essential interests of the international community and form the foundation of the international legal system. Because these norms preserve the fundamental interests of the community of nations, *jus cogens* norms invalidate all state actions that are inconsistent with their terms. Inherent in *jus cogens*, therefore, is the understanding that despite the justifications of state sovereignty, nation-states may

[7] *See*, generally, William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still A Party?*, 21 Brook. J. Int'l L. 277 (1995).

not violate, by treaty or by practice, the compelling interests of the global community embodied in *jus cogens* norms.[8] Clearly, should the United States continue to allow the execution of juvenile offenders, the *jus cogens* norm against such practice would be impermissibly violated.

III. Conclusion

National and international trends, both legally and as a matter of public policy, make clear the fact that our standards of decency have evolved since the Supreme Court's 1989 decision in ***Stanford***. The execution of a seventeen-year-old juvenile offender now constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution and Article I, §21 of the Missouri Constitution. Christopher Simmons' restraint under sentence of death is therefore illegal and improper. Only this Court's writ can cure this Constitutional violation.

WHEREFORE, petitioner Christopher Simmons respectfully requests that this Court issue its Writ of Habeas Corpus in this case vacating his unconstitutional sentence of death.

RESPECTFULLY
SUBMITTED,

/s/ Jennifer Brewer for
Patrick J. Berrigan, #34321
Watson & Dameron, L.L.P.
2500 Holmes
Kansas City, Missouri 64108

[8] (28 Geo. Wash. J. Int'l L. & Econ. 401)

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that true and accurate copies of the foregoing "Writ Summary" and "Petition for Writ of Habeas Corpus" were mailed on this 2nd day of May, 2002 by regular U.S. Mail, postage prepaid, to:

Ms. Cassandra Dolgin
Assistant Attorney General
PO Box 899
Jefferson City, Missouri 65102
Telephone: 573-751-3321
Attorney for Respondent

/s/ Jennifer Brewer
Counsel for Christopher Simmons

IN THE SUPREME COURT OF MISSOURI
EN BANC
September Session 2002

State ex rel. Christopher Simmons,
Petitioner,

vs. **No. SC84454** **WRIT OF HABEAS CORPUS**

Al Luebbers, Superintendent,
Potosi Correctional Center,
Respondent,

THE STATE OF MISSOURI
to
AL LUEBBERS, Superintendent,
Potosi Correctional Center,

GREETINGS:

You are hereby commanded that you file return to the Supreme Court of Missouri, en Banc, at Jefferson City, Missouri, showing the time and cause of detention of Christopher Simmons, who is in your custody detained, as it is said, under safe and secure conduct.

You are further COMMANDED that the production of the person of the petitioner, Christopher Simmons is waived, but you should file your written return with the Supreme Court of Missouri, en Banc, at the Supreme Court Building, in the City of Jefferson, on or before **December 11, 2002**, thereafter to do and receive what shall then and there be adjudged concerning the said Christopher Simmons, so by you detained as aforesaid, and hereof fail not at your peril, on date aforesaid.

Given under my hand and seal of

said Court, at the City of Jefferson, this 26th day of November, 2002.

\s\ Thomas Simon Clerk

\s\ Norma Jean Creach D.C.

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX REL. CHRISTOPHER SIMMONS,	)	
Petitioner,	)	
v.	)	No. 84454
AL LUEBBERS,	)	
Respondent.	)	

RETURN

Comes now respondent, by and through counsel, and states as follows as his return to the November 26, 2002 writ of habeas corpus.

Statement of Custody and Parties

Named petitioner, Christopher Simmons, is currently incarcerated at the Potosi Correctional Center located in Mineral Point, Missouri, pursuant to the sentence and judgment of the Circuit Court of Jefferson County, Missouri. Petitioner was found guilty of murder in the first degree, §565.020, RSMo. 1994, for which he was sentenced to death on August 14, 1994. Petitioner awaits execution. Don Roper, the current Superintendent of the Potosi Correctional Center, is petitioner's custodian and is the proper party respondent. Missouri Supreme Court Rules 91.04, .07.

Statement of the Issue

Petitioner contends that his sentence of death violates the state and federal constitutional bans on cruel and unusual

punishment and the state and federal constitutional provisions according due process, "in that a national consensus, the evolving standards of decency and the doctrine of jus cogens now exists that expressly forbid execution of juvenile offenders." (Petition, page 4).

Procedural Background

On August 19, 1994, petitioner received a sentence of death following his conviction upon one count of first degree murder. Section 565.020, RSMo. 1994. Petitioner filed a direct appeal, and then filed a motion to vacate, set aside or correct the judgment or sentence of the trial court pursuant to Missouri Supreme Court Rule 29.15. Petitioner's appeal from the denial of the Rule 29.15 motion was consolidated with his direct appeal. The facts relating to petitioner's offense are summarized in this court's opinion affirming petitioner's conviction, sentence and the denial of post-conviction relief. State v. Simmons, 944 S.W.2d 165 (Mo. banc 1997). The United States Supreme Court denied a petition for writ of certiorari on November 3, 1997. Simmons v. Missouri, 522 U.S. 953 (1997).

Petitioner sought habeas corpus relief pursuant to 28 U.S.C. §2254 from the United States District Court for the Eastern District of Missouri on July 15, 1998. The district court denied relief upon fourteen of petitioner's fifteen claims on March 24, 1999. Petitioner's remaining ground was denied in a separate memorandum and order dated August 5, 1999. On January 2, 2001, the United States Court of Appeals for the Eighth Circuit affirmed the denial of habeas corpus relief on petitioner's guilt phase and penalty phase claim. Simmons v. Bowersox, 235 F.3d 1124 (8th Cir. 1991). The United States Supreme Court denied the petition for writ of certiorari on October 1, 2001. Simmons v. Luebbers, 122 S.Ct. 280 (2001).

Standard of Review

"Rule 91 proceedings are limited to determining the facial validity of confinement on the basis of the entire record of the proceeding in question." State ex rel. Nixon v. Kelly, 58 S.W.3d 513, 516 (Mo. banc 2001). Rule 91 provides for review in a very limited number of situations. State ex rel. Simmons v. White, 866 S.W.2d 443, 446 (Mo. banc 1993). "[H]abeas corpus is not a substitute for appeal or post-conviction proceedings," id., and failure to raise claims therein "waives them and [the defendant] cannot raise them in a subsequent petition for habeas corpus." State ex rel. Nixon v. Jaynes, 63 S.W.3d 210, 214 (Mo. banc 2001).

This court has allowed state habeas review of procedurally defaulted post-conviction relief claims in extremely narrow circumstances, including "if the petitioner can assert either: (1) a claim of actual innocence or (2) a jurisdictional defect or (3)(a) that the procedural default was caused by something external to the defense -- that is, a cause for which the defense is not responsible -- and (b) prejudice resulted from the underlying error that worked to his actual and substantial disadvantage." Brown v. State, 66 S.W.3d 721, 731 (Mo. banc 2002) (citing Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000) and Jaynes, 63 S.W.3d 210).

In Clay, this court elaborated upon the "manifest injustice" exception to permit review of defaulted claims:

> Following the lead of the United States Supreme Court's habeas corpus cases, and most recently Schlup v. Delo, 513 U.S. 298, 327, 130 L.Ed.2d 808, 115 S.Ct. 851 (1995), this Court holds that the manifest injustice or miscarriage of justice standard requires the habeas corpus petitioner "to show that 'a constitutional violation has

> probably resulted in the conviction of one who is actually innocent,'" id. quoting Murray v. Carrier, 477 U.S. 478, 496, 91 L.Ed.2d 397, 106 S.Ct. 2639 (1986), and further, "to establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light [of new evidence of innocence]," id.

Clay, 37 S.W.3d at 217. Federal courts have limited the actual innocence gateway to factual innocence as opposed to legal innocence. Pitts v. Norris, 85 F.3d 348, 350-51 (8th Cir.) ("The actual innocence exception is concerned with claims of actual, not legal, innocence. . . . . It is evidence of factual innocence coupled with a constitutional violation which triggers the actual innocence exception" and giving examples of factual innocence including a credible declaration of guilt by another, trustworthy eyewitness accounts proving innocence, and exculpatory scientific evidence) (internal citations omitted), cert. denied, 519 U.S. 972 (1996); accord Embrey v. Hershberger, 131 F.3d 739, 741 (8th Cir. 1997), cert. denied, 525 U.S. 828 (1998); Andrews v. Norris, 108 F.3d 163, 164 (8th Cir. 1997).

Analysis

I. Petitioner's Habeas Corpus Claims Are Procedurally Barred

Now, for the first time in more than five years after this court affirmed the judgment of the conviction and sentence and the denial of post-conviction relief, petitioner claims that his sentence of death violates both the federal and state constitutional provisions of due process and the prohibition against cruel and unusual punishment, on the basis of evolving standards of decency and principles of international law. On these bases now asserted, petitioner did not challenge the constitutionality of the death sentence in his post-conviction

motion or on appeal to this court. In his petition, petitioner makes no attempt to demonstrate that his defaulted claim is reviewable under Rule 91. Indeed, it would appear that petitioner apparently believes to the contrary, based upon representations made in furtherance of a petition filed on his behalf to the Inter-American Commission on Human Rights. See Respondent's Exhibit A, at 1 ("This is an urgent matter as the Victim [Simmons] has exhausted his domestic rights to challenge the conviction that result [sic] in his sentence of death and that sentence."); id. at 9 ("10. Domestic Legal Remedies Yet To Be Pursued -- There are no further legal remedies available to the Victim [Simmons] that will allow him to raise the issues in this complaint.").

Before the motion court, petitioner contended that §565.030, RSMo. 1986 and that MAI-CR3d 313.40 to 313.48 violated due process and freedom from cruel and unusual punishment on the basis that:

(1) "[t]hese instructions and statutes placed the burden of proof upon [sic] to prove to the unanimous satisfaction of the jurors that the mitigating circumstances in order to receive the benefit of his mitigating circumstances. . . . ," Rule 29.15 Legal File, Volume I, at 105;

(2) "MAI-CR3d 313.42 instructed the jury that the only evidence that it could consider in determining whether death was 'warrant[ed]' was that evidence relating to the murder of the victim and the aggravating circumstances. . . . Therefore the jury instructions mandated a decision on whether the aggravating circumstances 'warrant the imposition of death' before the jury is allowed to consider mitigating circumstances. . . . ," id. at 106;

(3) "[t]he only use the jury was specifically instructed that it could make of mitigating circumstances came in MAI-

CR3d 313.44. . . . Combined with MAI-CR3d 313.40, 313.41, and 313.42, these instructions cumulatively forbade the jury from considering mitigating circumstances in the decision of whether death was 'warranted' and the placed the burden of proof on [sic] to prove to the unanimous satisfaction of the jurors that his mitigating circumstances outweighed the aggravating circumstances before he could receive any benefit from them. . . . ," id. at 107;

(4) "MAI-CR3d 313.46 did not cure the constitutional error of MAI-CR3d 313.40, 313.41, and 313.42, which forbade consideration of mitigating circumstances in the determination of whether death was 'warrant[ed]', and 313.44, which shifted the burden of proof to [sic] to prove that mitigating circumstances outweighed aggravating circumstances before he could receive any benefit from those mitigating circumstances. . . . ," id. at 107-108; and

(5) "the instructions are not written in a manner such that they can be comprehended by the average juror . . . . ," id. at 109.

On appeal to this Court, petitioner challenged the constitutionality of his death sentence on the following bases:

(1) "Christopher's death sentence is disproportionate to sentences in similar cases because Christopher is young, only seventeen at the time of the offense, this was his first offense, he suffered a turbulent and abusive childhood, he suffered from mental illness, and was threatened by Brian Moomey, a convicted felon who provided drugs and alcohol to feed Christopher's addiction," Appellant's Statement, Brief And Argument (hereinafter "Appellant's Brief"), at 27;

(2) "[t]his Court's refusal to engage in meaningful proportionality review, including lack of adequate notice and

opportunity to be heard, its refusal to consider all similar cases, its comparison of only other death penalty cases with similar aggravators, and its inadequate data base . . . . ," id.;

(3) "Chapter 565 vests unrestricted discretion in the prosecutor to seek the death penalty . . . . ," id. at 28;

(4) "[t]he death penalty is unjustified as a means of achieving any legitimate governmental goal and is excessive because the State's interest in protecting the public from dangerous criminals who commit violent crimes can be achieved by sentencing such defendants to life imprisonment without probation or parole." id.; and

(5) "[t]he trial court erred in overruling the motion to strike the aggravating circumstance, depravity of mind, and objection to instruction 16 because . . . : "the aggravator is unconstitutionally vague, both facially and as applied as any homicide shows a 'callous disregard for the sanctity of all human life,' and as a result the so-called 'narrowing' definition does not distinguish cases in which the death penalty is imposed from those which are not," id. at 39.

As the foregoing readily demonstrates, petitioner's prior challenges to the constitutionality of his death sentence failed to rely upon international law or evolving standards of decency in regard to the execution of offenders that were under the age of eighteen at the time of the offense. Since petitioner cannot demonstrate an exception to allow review of his defaulted claim, Brown, 66 S.W.3d at 731, there is no basis for this court to consider the underlying merits of petitioner's procedurally defaulted claims.

II. Petitioner's Habeas Claims Do Not Present Jurisdictional Issues

Pursuant to §565.020.2, RSMo. 2000, a person who commits the offense of murder in the first degree and who had reached his sixteenth birthday at the time of commission of the crime is eligible for consideration of the death penalty. Petitioner does not deny that he had reached the age of sixteen at the time he murdered Shirley Crook; in fact, in his appeal to this court, petitioner admitted that he was seventeen years old when he committed the offense (App. Brf., pages 2, 27, 79). The sentencing court acted within its jurisdiction in sentencing petitioner to death upon the jury's verdict. Accordingly, there is not a jurisdictional basis for permitting habeas review of petitioner's defaulted claims.

III. Petitioner Cannot Establish Factual Innocence

As this court stated in Jaynes "[t]here is a balance that must be struck between the need for finality of judgments and the need to accommodate the claims of a purportedly innocent defendant wrongfully convicted." Id., 63 S.W.3d at 215. However, petitioner does not assert that he is actually innocent of the murder of Shirley Crook -- i.e., "'that it is more likely than not that no reasonable juror would have convicted him in light of newly discovered evidence' . . . . ", id. at 216 (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)), or that he is actually innocent of the death penalty -- i.e., showing "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." Sawyer v. Whitley, 505 U.S. 333, 336 (1992). Indeed, petitioner does not cite newly discovered evidence to establish that he is factually innocent of the murder, Schlup, 513 U.S. at 316, or that there are not statutory aggravating circumstances that make him eligible for the death penalty, Sawyer, 505 U.S. at 347; Lingar v. Bowersox, 176 F.3d 453, 462 (8th Cir. 1999), cert. denied, 529 U.S. 1039 (2000), to serve as the gateway to otherwise permit consideration of the defaulted constitutional claims.

To the extent that petitioner may contend that his status as a juvenile at the time of the murder would render him ineligible for the death penalty, such a contention would be a claim of legal rather than factual innocence. As discussed earlier, federal court have limited the actual innocence gateway to factual innocence as opposed to legal innocence. Pitts, 85 F.3d at 350-51. As the United States Supreme Court made plain in Sawyer, in respect to a sentence of death, "the 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error." Id., 505 U.S. 347. Petitioner's constitutional challenge to his execution as a juvenile offender at the time of the offense does not have any bearing on the existence of the aggravating circumstances that the jury found in this case -- i.e., that the murder was committed for the purpose of receiving money or any other thing of value, that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of defendant, and that the murder involved depravity of mind and as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman (Legal File at 278).

Based on the foregoing, petitioner has failed to meet his burden under the manifest injustice exception to permit consideration of his defaulted claim.

IV. Petitioner Cannot Establish Cause to Excuse the Default

To establish cause as the first prong to overcome a procedural default, the petitioner must "'show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" Jaynes, 63 S.W.3d at 215 (quoting Murray v. Carrier, 477 U.S. at 488).

No later than 1992, before petitioner murdered Shirley Crook, he was put on notice that a number of international treaties had been entered into that included a provision against the execution of juvenile offenders, including the International Covenant on Civil and Political Rights (hereinafter "ICCPR"). The United States Senate ratified the ICCPR on April 2, 1992, with an express reservation to Article 6(5) -- the provision precluding the execution of juvenile offenders. Notwithstanding such preexisting international provisions, petitioner failed to assert international trends as a basis for rendering his death sentence constitutionally infirm.[9] Significantly, petitioner also failed to raise this procedurally defaulted claim in his federal habeas proceeding. Under Cause No. 4:97-CV-2415 JCH, petitioner raised the following grounds for relief challenging the sentence of death: VII. Aggravating circumstance of depravity of mind was unconstitutionally vague; XI. Death penalty is administered and applied arbitrarily, capriciously and disproportionately in Missouri; and XII. Section 565.035.3, RSMo. requiring proportionality review as written and applied violates due process. (See Respondent's Exhibit B, at 47-49, 56-57, 57-59 respectively).

Petitioner thus is unable to establish cause for his default -- i.e., to demonstrate that some objective factor external to the defense impeded his effort to raise this basis on direct appeal or in his motion for post-conviction relief. Accordingly, this court should not permit petitioner to circumvent his procedural defaults occurring in the state motion court and before this court previously on appeal, and in federal court as recently as 1998 upon the filing of his federal habeas petition.

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[9]To the extent that petitioner were to contend that his execution violates international law, the claim is not cognizable in a Rule 91 proceeding. See Jaynes, 63 S.W.3d at 214 ("a writ of habeas corpus can be issued when a person is held in detention in violation of the constitution or laws of the state or federal government.").

V. Petitioner is Entitled to No Relief

In Stanford v. Kentucky, the United States Supreme Court held that the Eighth Amendment does not preclude the death penalty for individuals who commit murder at sixteen or seventeen years of age. 492 U.S. 361, 380 (1989). The decision in Stanford was not overruled in Atkins v. Virginia, 122 S.Ct. 2242 (2002). In Atkins, the Supreme Court held that the Eighth Amendment precluded the execution of a mentally retarded offender. Id. at 2252. Petitioner ignores the obvious distinction, and without citing any supporting precedent, instead, urges this court to use "the framework of the reasoning in Atkins . . . . " (Appellant's Suggestions As To The Applicability Of Atkins v. Virginia To The Issues In Mr. Simmons' Case, page 2). "Constitutional rights [,however,] are not defined by inferences from opinions which did not address the question at issue." Texas v. Cobb, 532 U.S. 162, 169 (2001).

Petitioner cannot cite any United States Supreme Court decision that expressly overrules Stanford. Petitioner's reliance upon "the basis for the decision in Atkins" is thus contrary to United States Supreme Court precedent. That petitioner may believe youthfulness is characterized by attributes comparable to those found in mentally retarded individuals, (see Petitioner's Suggestions, page 4) ("juvenile mental state mirrors that of the mentally retarded. . . ."), does not establish that they are one in the same.[10] Indeed, the Supreme Court's holding is limited to

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[10]Unlike mental retardation, youthfulness is not a mental disorder. Compare American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV). Nor is the significant subaverage intellectual function prong of mental retardation a characteristic of youth status. See, e.g., Johnson v. Texas, 509 U.S. 350, 367

the narrow question presented: "Whether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment?," Atkins v. Virginia, 122 S.Ct. at 29, and there is no evidence that the Supreme Court considered the issue for which petitioner now seeks relief. Cf., Atkins v. Virginia, No. 00-8452, Tr. of February 20, 2002, Oral Argument, at 2002 U.S. TRANS. LEXIS 19.

The Supreme Court's reference to Stanford in Atkins further refutes any suggestion that the court equated youth with mental retardation and decided the constitutionality of executing a juvenile offender when it decided the constitutionality of executing a mentally retarded offender. There, the Supreme Court noted the distinction between change in legislative enactments prohibiting the execution of the mentally retarded with that prohibiting the execution of juvenile offenders:

> [a] comparison to Stanford v. Kentucky, 492 U.S. 361, 106 L.Ed.2d 306, 109 S.Ct. 2969 (1989), in which we held that there was no national consensus prohibiting the execution of juvenile offenders over age 15, is telling. Although we decided Stanford on the same day as Penry, apparently only two state legislatures have raised the threshold age for imposition of the death penalty. Mont. Code Ann. §45-5-102 (1999); Ind. §35-50-2-3 (1998).

(1993) ("[Youth] is a time and condition of life when a person may be most susceptible to influence and to psychological damage . . . . A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults . . . . ") (emphasis added; internal citation and quotation marks omitted); Webster's Seventh New Collegiate Dictionary (1966), at 462, 1038, respectively ("juvenile defined as physiologically immature or undeveloped: young"; "youth" defined as "the period of life marked by growth and development; esp: the period between childhood and maturity").

Atkins, 122 S.Ct. at 2249 n.18. Regarding the national consensus issues itself, as the Supreme Court observed in Atkins, when the execution of mentally retarded offenders was previously held constitutional, legislative enactments by two states did "'not provide sufficient evidence at present of a national consensus.'" Id. at 2248 quoting Penry v. Lynaugh, 492 U.S. 302, 334 (1989). Since Stanford, only two states have enacted statutes barring the execution of offenders who committed murder before age eighteen. Atkins, 122 S.Ct. at 2249 n. 18. While petitioner relies upon the consideration of legislation by other jurisdictions rather than the actual passage and enactment of legislation limiting the death penalty to establish an emerging trend favoring abolition of the death penalty for juvenile offenders (Petition, page 5), "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the countries' legislatures.'" Atkins, 122 S.Ct. at 2247 (emphasis added) (quoting Penry, 492 U.S. at 331); accord, Stanford, 492 U.S. at 370). Rather than demonstrating the national consensus, the failure to enact such proposed legislation, at the least, demonstrates no such consensus for abolishing the death penalty for juvenile offenders.

Finally, while petitioner asserts that failure to apply Atkins would violate United States Supreme Court precedent (Petitioner's Suggestions, page 2), petitioner fails to acknowledge that the United State Supreme Court declined to grant review of the very Eighth Amendment issue now raised while Atkins was pending before that court -- and notwithstanding that the petitioner there specifically invoked Atkins. See Beazley v. Texas, No. 01-10329, 122 S.Ct. 2287 (2002) (Respondent's Exhibit C, pages 29-31, 55-59; Respondent's Exhibit D). Similarly, the United States Supreme Court denied an original petition for writ of habeas corpus and a motion for stay which also relied on the pending status of the

Atkins case (Respondent's Exhibit E, pages 40-41, 53-55; Respondent's Exhibit F). In Re Beazley, 122 S.Ct. 2322 (2002). Beazley was executed on May 28, 2002.

While these actions are without precedential value, surely the Supreme Court would have stayed Beazley's execution if that court understood the issue presented in Atkins, and which was decided twenty-three days after Beazley's execution to apply to the execution of juvenile offenders. E.g., Davis v. Texas, 122 S.Ct. 1815 (2002) (granting stay of execution pending decision in Atkins). Similarly, if Atkins were to apply to juvenile offenders, surely these Supreme Court would have granted certiorari in the Beazley case pending the decision in Atkins and thereupon vacated the judgment below and remanded the case for consideration in light of Atkins. See Lawrence v. Chater, 518 U.S. 163, 167 (1996). The Supreme Court invoked the remand mechanism in other cases that had sought certiorari before Atkins was decided. See e.g., Perkins v. Alabama, 122 S.Ct. 2653 (2002); Bell v. Cockrell, 122 S.Ct. 2654 (2002); Modden v. Texas, 122 S.Ct. 2654 (2002).

Similarly, since the Atkins decision, the United States Supreme Court has declined to intervene on the issue of the execution of those who were juveniles when they murdered. See In Re Stanford, 123 S.Ct. 472, 472 (2002); Patterson v. Texas, 123 S.Ct. 24 (2002). Because Stanford v. Kentucky, supra, remains the controlling United States Supreme Court precedent governing the constitutionality of executing an individual that was younger than eighteen at the time that the person committed murder, the writ of habeas corpus should be set aside.

Respectfully submitted,

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SUPREME COURT OF MISSOURI

en banc

State ex rel. Christopher Simmons,	)
	)
Petitioner,	)
	)
vs.	)**No. SC84454**
	)
Donald P. Roper, Superintendent, Potosi Correctional Center,	)
	)
Respondent.	)

ORIGINAL PROCEEDING IN HABEAS CORPUS

Christopher Simmons was sentenced to death for a murder he committed when he was 17 years old. He argues that to execute him for a crime committed when he was under 18 constitutes cruel and unusual punishment.

In ***Thompson v. Oklahoma*, 487 U.S. 815 (1988),** the Supreme Court of the United States held that it constituted cruel and unusual punishment to execute persons who were 15 years of age or younger at the time of their offense. The following year, in ***Stanford v. Kentucky*, 492 U.S. 361 (1989),** the Supreme Court held that there was not then a national consensus against the execution of those who were 16 or 17 years old at the time of their crimes and declined to bar such executions. On that same day, the Supreme Court held that there was not then a national consensus to bar the execution of those who were mentally retarded. ***Penry v. Lynaugh*, 492 U.S. 302 (1989).**

In 1993, Christopher Simmons murdered Shirley Crook. Because of ***Stanford***, he did not argue that his age constituted a bar to imposition of the death penalty, although he did argue that his age was a mitigating circumstance. He was convicted of first-degree murder and sentenced to death in accordance with the jury's verdict. This Court affirmed his conviction and death sentence, as well as the denial of post-conviction relief. ***State v. Simmons*, 944 S.W.2d 165 (Mo. banc 1997), *cert. denied*, 522 U.S. 953 (1997).**[1]

Last year, in ***Atkins v. Virginia*, 536 U.S. 304 (2002),** the Supreme Court held that a national consensus had emerged against the execution of mentally retarded offenders since ***Penry***. Mr. Simmons now asks us to hold that a similar consensus against the execution of juveniles has developed since ***Stanford***, that the rationale for the Supreme Court's determination that the execution of juveniles was not cruel and unusual punishment has disappeared, and that the Eighth Amendment bars his execution.

This Court agrees. Applying the approach taken in ***Atkins***, this Court finds that, in the fourteen years since ***Stanford*** was decided, a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since ***Stanford***, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the

[1]The facts underlying Mr. Simmons' crime and conviction are set out in detail in that opinion and will not be repeated here.

last decade.[2] Accordingly, this Court finds the Supreme Court would today hold such executions are prohibited by the Eighth and Fourteenth Amendments. It therefore sets aside Mr. Simmons' death sentence and re-sentences him to life imprisonment without eligibility for probation, parole, or release except by act of the Governor.

I. RETROACTIVE APPLICATION OF JUVENILE DEATH PENALTY

The state contends that this Court should not reach the substantive issue whether the execution of persons for crimes committed as juveniles is prohibited by the Eighth and Fourteenth Amendments, because Mr. Simmons is barred from raising it since he did not do so at the time of his trial. We reject this argument.

In ***Penry***, before reaching the substantive issue whether

[2]The terms "juvenile death penalty" and "juvenile executions" are terms of art used to refer to the execution of those who were under age 18 at the time of their crimes. The term "juvenile" is therefore used in this opinion to refer to those under age 18 when they committed their crime, although the Court recognizes that, for purposes of juvenile division jurisdiction, 17-year-olds are not considered juveniles in Missouri. ***Sec.* 211.031**. Various other states that also treat 17-year-olds as adults for purposes of juvenile court jurisdiction nonetheless do not have a juvenile death penalty - that is, they bar the execution of those under 18 at the time of their crimes. ***See* Office of Juvenile Justice and Delinquency Prevention, *OJJDP Statistical Briefing Book* (Apr. 25, 2002), *at* http://ojjdp.ncjrs.org/ojstatbb/html/qa085.html.** Of course, 16-year-olds are also now subject to the death penalty in Missouri even though they *are* considered juveniles by Missouri's court system, although they can be certified to stand trial as an adult. ***Sec.* 211.071**. In Missouri, a 15-year-old can also be certified for trial as an adult but cannot be subjected to the death penalty. ***Id.*** Self-evidently, the death penalty presents different issues than does the issue of who is a juvenile for purposes of juvenile division jurisdiction.

the Eighth Amendment prohibited the execution of the mentally retarded, the Supreme Court considered whether a decision barring such executions would apply retroactively under the principles set out in ***Teague v. Lane*, 489 U.S. 288 (1989).** ***Penry*** answered the question in the affirmative, stating, "[T]he first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." ***Id.* at 330.** The Supreme Court concluded:

> Thus, if we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review.

Id.

Penry went on to hold that no national consensus against the execution of the mentally retarded existed in 1989. But, ***Atkins*** found that such a consensus had developed by 2002 and that the Eighth Amendment "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." ***Atkins*, 536 U.S. at 321, *quoting*, *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).** In ***Johnson v. State*, 102 S.W.3d 535, 539-40 (Mo. banc 2003)**, this Court determined that ***Atkins*** applied retroactively. ***Accord Van Tran v. State*, 66 S.W.3d 790, 811 (Tenn. 2001)** (holding prior to ***Atkins*** that new rule barring execution of mentally retarded would be applied retroactively).

In parallel fashion, if, as a substantive matter, the Eighth Amendment prohibits the execution of persons under age 18 at

the time of their offense regardless of the procedures followed, then such a rule would also fall under the first exception to nonretroactivity under ***Teague*** because it would deprive the state of the power to impose the punishment of death on such a person. ***Cf. Penry*, 492 U.S. at 330**. Such a rule would therefore be applicable to persons, such as Mr. Simmons, whose cases are on collateral review, and the usual waiver rules will not apply.[3] ***See also Reed v. Ross*, 468 U.S. 1, 16 (1984)** ("[W]here a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures.").

II. NATIONAL CONSENSUS AGAINST EXECUTION OF JUVENILES AND THE MENTALLY RETARDED

To determine whether the application of the death penalty to juveniles constitutes cruel and unusual punishment, it is helpful to examine the Supreme Court's decisions in prior cases addressing the execution of juveniles and of the mentally retarded.

A. The Death Penalty for Juveniles: Thompson and Stanford

1. Thompson v. Oklahoma. **In *Thompson*, 487 U.S. 815 (1988)**, the Supreme Court determined that the Eighth Amendment categorically prohibits the execution of those who were 15 years old or younger at the time of their crimes. Using

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[3]Because, here, ***Teague*** requires retroactive application, and because state courts cannot apply retroactivity principles more narrowly than did ***Teague***, there is no need to undertake the ***Stovall v. Denno*, 388 U.S. 293 (1967)**, analysis discussed by this Court in ***State v. Whitfield*, 107 S.W.3d 253, 267-68 (Mo. banc 2003)**.

an approach similar to that which he would utilize in ***Atkins*** some fourteen years later, Justice Stevens, in the principal opinion, said that in determining what constitutes cruel and unusual punishment, judges should be "guided by the 'evolving standards of decency that mark the progress of a maturing society.'" ***Id.*** **at 821,** ***quoting, Trop v. Dulles*****, 356 U.S. 86, 101 (1958)**. Such standards cannot remain static, but must "'acquire meaning as public opinion becomes enlightened by humane justice,'" for "'a principle to be vital must be capable of wider application than the mischief which gives it birth.'" ***Id.*** **at 821 n.4,** ***quoting, Weems v. United States*****, 217 U.S. 349, 373, 378 (1910)**.

To determine current standards of decency, ***Thompson*** examined: (a) relevant legislative enactments, and (b) evidence of how juries viewed the propriety of execution of the mentally retarded. It also considered (c) the views of respected national and international organizations. Finally, in light of the above and other factors, (d) the Supreme Court made its own judgment as to the propriety of such executions and explained "why these indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty." ***Thompson*****, 487 U.S. at 822-23**.

a. Legislative Enactments. In reviewing statutes governing punishment of children, ***Thompson*** found that "[t]he line between childhood and adulthood is drawn in different ways by various States." ***Id.*** **at 824**. Fourteen state legislatures then barred capital punishment altogether. ***Id.*** **at 826**. In nineteen other states, the legislature permitted capital punishment, but state statutes failed to expressly state the minimum age for its imposition. ***Id.*** **at 826-27**. Eighteen remaining states set a minimum age, varying from 16 to 18. ***Id.*** **at 829**. No legislature had adopted a statute explicitly permitting the execution of those under age 16. ***Id.***

b. Imposition of the Death Penalty. ***Thompson*** also found that juries rarely imposed the death penalty on those under 16, that only eighteen to twenty such persons had been executed in the 20th century, and only one since 1948. ***Id.*** **at 832**. Between 1982 and 1986, only five persons age 15 or younger were sentenced to death in the United States, leading the Court to conclude that, "these five young offenders have received sentences that are 'cruel and unusual in the same way that being struck by lightning is cruel and unusual.'" ***Id.*** **at 833,** ***quoting, Furman v. Georgia*****, 408 U.S. 238, 309 (1972)** (quoting Stewart, J., concurring).

c. National and International Views. As a part of its discussion of legislation, the Supreme Court considered the views of respected national religious, social, and professional organizations, including the American Bar Association ("ABA") and the American Law Institute, both of which it said "have formally expressed their opposition to the death penalty for juveniles." ***Id.*** **at 830**. And, stating that it had "previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual," ***id.*** **at 830 n.31** (citations omitted), the Court also considered the sentencing practices of European and other countries, stating:

> Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland.

> Juvenile executions are also prohibited in the Soviet Union.

***Id.* at 831-31** (footnote omitted).

d. Independent Analysis. Lastly, ***Thompson*** analyzed the culpability of juveniles as compared to adults and considered whether application of the death penalty to juveniles measurably contributed to the social purposes it was intended to serve. After noting "broad agreement on the proposition that adolescents as a class are less mature and responsible than adults" and "the special mitigating force of youth," the Court concluded that "less culpability should attach to a crime committed by a juvenile." ***Id.* at 834-35**. As to the social rationales of the death penalty - retribution and deterrence - it found them unacceptable for 15-year-old offenders because of the "lesser culpability of the juvenile offender" and because deterrence would not be jeopardized if the execution of those under 16 were prohibited. ***Id.* at 836-37**.

In light of all of these factors, ***Thompson*** concluded that a national consensus existed that execution of persons under 16 at the time of their crimes constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. ***Id.***

2. ***Stanford v. Kentucky***. The following year, in ***Stanford*, 492 U.S. 361**, Justice Scalia stated in the principal opinion that, by contrast, the Eighth and Fourteenth Amendments did not prohibit imposition of the death penalty for crimes committed at age 16 or 17. ***Id.* at 370-77**. In so holding, Justice Scalia agreed that what constitutes cruel and unusual punishment must be determined by current standards rather than by those in effect in 1789. ***Id.*** But, he said, current standards are almost entirely to be determined by reference to "statutes passed by society's elected representatives," ***id.* at 370,**

and specifically by state legislatures. He then noted that, while the majority of states did not permit the execution of juvenile offenders, that count included the fourteen states that then barred capital punishment altogether. ***Id.* at 370 n.2**. If one considered only those states permitting capital punishment, then the majority of that subgrouping approved the execution of those who were 16 or 17 at the time of their offense. ***Id.* at 370**.

And, although ***Stanford*** recognized that juries sentence substantially fewer juveniles than adults to death, it said this did not provide a reason to prohibit such death sentences entirely. ***Id.* at 373-74.** ***Stanford*** also rejected, as irrelevant, the many state statutes barring those under 18 years old from engaging in various activities, such as voting, drinking, or driving. ***Id.* at 374-77**. Similarly, although a year earlier ***Thompson*** had said the views of social, professional, and religious groups, as well as the sentencing practices of other countries, were relevant to determining current standards of decency, ***Stanford*** stated that the views of national organizations were an "uncertain foundation" on which to base constitutional law and that *international* practices were simply irrelevant to whether a *national* consensus existed. ***Id.* at 369 n.1, 377**. After so limiting its inquiry, ***Stanford*** concluded that there was no national consensus against executing offenders who were 16 or 17 at the time of the offense. ***Id.* at 370-72, 379-80**.

B. From Penry to Atkins: Development of a National Consensus Against Execution of the Mentally Retarded.

1. ***Penry v. Lynaugh***. The same day that the Supreme Court held in ***Stanford*** that there was no national consensus against imposition of the death penalty on juveniles, it held in ***Penry*, 492 U.S. 302**, an opinion authored by Justice O'Connor, that there was also no national consensus against imposition of the death penalty on the mentally retarded. Like ***Thompson*** and

Stanford, Penry recognized that what constitutes cruel and unusual punishment is not a static concept, immutably tied to what punishments would have been included within the reach of the Eighth Amendment when the Bill of Rights was adopted in 1789. ***Id.* at 330**. Rather, the "prohibition against cruel and unusual punishments also recognizes the 'evolving standards of decency that mark the progress of a maturing society.'" ***Id.* at 330-31, *quoting, Trop*, 356 U.S. at 101**. And, like ***Stanford, Penry*** looked to statutes passed by state legislatures as the best type of "objective evidence of how our society views a particular punishment today." ***Id.* at 331**. ***Penry*** also said that the Court "looked to the data concerning the actions of sentencing juries." ***Id.***

a. Legislative Action. When ***Penry*** was decided in 1989, only Georgia, Maryland, and the federal government had statutes barring the imposition of the death penalty on the mentally retarded. ***Id.* at 334**. The Supreme Court concluded that "the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence *at present* of a national consensus." ***Id.*** (emphasis added).

b. Other Factors. Mr. Penry was unable to provide evidence that juries chose not to sentence mentally retarded defendants to death. In addition, on the record before it, the Supreme Court said it could not conclude that "all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty." ***Id.* at 338-39**. For these reasons, the Court determined that "at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment." ***Id.* at 335**.

2. ***Atkins v. Virginia***. In 2002, the Supreme Court revisited the issue of capital punishment of the mentally retarded in the case of Daryl Atkins, an allegedly mentally retarded man whose death sentence had been affirmed by the Virginia Supreme Court based on ***Penry***'s determination that there is no national consensus against the execution of the mentally retarded. In a principal opinion by Justice Stevens, the Supreme Court reversed Mr. Atkins' death sentence and remanded for a determination of his mental status. ***Atkins*, 536 U.S. 304**. In so holding, ***Atkins*** reaffirmed that whether capital punishment is barred for certain classes of offenders is necessarily part of a fluid, rather than a static, process and that as our standards of decency evolve, so will the determination of what constitutes cruel and unusual punishment. ***Id.* at 312**.

Atkins' analysis more closely resembles that in ***Thompson*** than that in ***Stanford***. ***Atkins***: (a) first looked at the objective evidence of legislative intent provided by state legislation barring the death penalty. (b) Like ***Penry***, it considered the frequency with which the death penalty was imposed on the mentally retarded. (c) It then looked to the opinions of national professional, religious, and social organizations, and the approach of other countries to the death penalty for the mentally retarded. (d) Finally, it undertook an independent examination of whether the imposition of the death penalty on the mentally retarded constitutes cruel and unusual punishment under today's evolving standards of decency. ***Id.* at 313**.

a. Legislative Action. ***Atkins*** found that, in the thirteen years after ***Penry***, fourteen more states - including Missouri - had adopted legislation barring the application of their death penalty laws to the mentally retarded. And, while New York and Nebraska had each reinstated the death penalty, each had specifically exempted the mentally retarded from the reach of those newly enacted statutes. ***Id.* at 314-15**. When these

sixteen new states were added to the two states that had already adopted such legislation in 1989, eighteen states, and the federal government, then prohibited imposition of the death penalty on the mentally retarded. ***See id***. In addition, the Court noted that the Texas legislature had unanimously adopted a bill barring the execution of the mentally retarded, but the bill was vetoed by the governor on other grounds, and that at least one house of the Virginia and Nevada legislatures had similarly adopted bills barring the death penalty for the mentally retarded. ***Id.* at 315.**[4]

While the number of states barring imposition of the death penalty had clearly grown impressively, the Court stated that, "*It is not so much the number of these States that is significant, but the consistency of the direction of change.*" ***Id***. (footnote omitted) (emphasis added). This consistency was further reflected by the fact that, since ***Penry***, no state had adopted a law permitting the execution of the mentally retarded. ***Id.* at 315-16**. The Court found such consistency particularly persuasive given the anticrime atmosphere of the times:

> Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.

Id.

b. Frequency of Imposition of Death Penalty. The Court found that some states, such as New Hampshire and New Jersey, whose statutes nominally authorize the execution of mentally retarded persons, had not carried out executions of any persons in decades, thus removing the incentive to pass legislation barring execution of the mentally retarded in particular. ***Id.* at 316**. And, in those states that still carried out executions, the Court found, the practice of executing mentally retarded offenders had become very uncommon: only five persons who were known to have an I.Q. of less than 70 had been executed in the thirteen years since ***Penry***. ***Id***. The Court concluded that "[t]he practice. . . has become truly unusual, and it is fair to say that a national consensus has developed against it." ***Id***.

c. National and International Opposition to Death Penalty. ***Atkins*** stated that the consensus against the death penalty for the mentally retarded was evident not only from the legislation passed over the prior thirteen years, and the rareness of the application of the death penalty in those states that permitted its use, but also from the opposition to the practice from experts in the field, noting "several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender," including the American Psychological Association

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[4] In footnote 18, ***Atkins*** contrasted these substantial legislative changes with the fact that, since ***Stanford***, "apparently only two state legislatures have raised the threshold age for imposition of the death penalty" for juveniles, but did not purport to present a complete picture of the legislative activity on the juvenile death penalty since ***Stanford***, an issue not then before it. ***Atkins*, 536 U.S. at 316 n.18** (citations omitted). As discussed *infra*, eleven states and the federal government already barred the death penalty for juveniles when ***Stanford*** was decided, two have done so since, others are considering doing so, two other legislatures have enacted statutes that do not permit execution of those under 18, and the state of Washington has barred juvenile executions by court decision. It is noteworthy that twelve additional states and the District of Columbia bar executions altogether.

and the American Association of Mental Retardation. ***Id.* at 316 n.21**. The Court also found the sentiments of this nation's religious communities, and of the world community, to be overwhelmingly opposed to execution of the mentally retarded. ***Id.*** Finally, the Court cited to polling data that showed "a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong." ***Id.*** While the Court stated that the opposition of these groups was by no means dispositive, the Court did find significant their "consistency with the legislative evidence," stating that it provided "further support to [the Court's] conclusion that there is a consensus among those who have addressed the issue." ***Id.***

d. Independent Judicial Determination. Finally, the Supreme Court undertook an independent evaluation of whether such executions should be prohibited. It found that neither the retributive nor the deterrence justifications for the death penalty would be furthered by executing the mentally retarded, stating, "If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." ***Id.* at 319.**[5] It further concluded, "the same cognitive and behavioral impairments that make [mentally retarded] defendants less morally culpable . . . also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." ***Id.* at 320**.

The Court further implicitly rejected the suggestion in ***Penry*** that the death penalty could not be barred if any mentally

[5]In ***Godfrey v. Georgia*, 446 U.S. 420 (1980)**, the Supreme Court set aside a death sentence because the petitioner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." ***Id.* at 433**.

retarded person might theoretically deserve it, so that the effect of mental retardation should instead simply be considered as a mitigating factor. ***Id.* at 318-19**. Rather, it said, the very fact that persons are mentally retarded not only makes them more likely to give a false confession, but also makes them less able to assist their counsel, typically makes them poor witnesses, and may cause them to exhibit a demeanor that is unsympathetic and that may incorrectly imply a lack of remorse. ***Id.* at 320-21**. Its independent evaluation led the Court to conclude that "death is not a suitable punishment for a mentally retarded criminal." ***Id.* at 321**.

II. APPLICATION OF THE PRINCIPLES SET OUT IN ATKINS, THOMPSON, PENRY, AND STANFORD TO THE EXECUTION OF JUVENILES TODAY

A. Stanford Does Not Preclude This Court from Considering Whether a National Consensus Now Exists Barring the Death Penalty for Juveniles.

The state argues, and the dissenting judges would hold, that whatever the Supreme Court held in ***Atkins*** is irrelevant to the instant case because this Court is bound by ***Stanford*** to hold that there is no constitutional bar to the execution of persons who were 16 or 17 years of age at the time of their crimes. This argument ignores the fundamental premise on which ***Stanford***, as well as ***Thompson***, ***Penry***, and ***Atkins***, were based: that "this Court has not 'confined the prohibition embodied in the Eighth Amendment to 'barbarous' methods that were generally outlawed in the 18th century,' but instead has interpreted the Amendment 'in a flexible and dynamic manner.'" ***Stanford*, 492 U.S. at 369, *quoting*, *Gregg v. Georgia*, 428 U.S. 153, 171 (1976)**. Court should be guided by the conceptions of decency of "modern American society as a whole." ***Id.*** (footnote omitted).

Atkins recently reaffirmed that decisions as to standards of decency are to be decided by current standards, not ones of years ago. ***Atkins*, 536 U.S. at 312**. And, that is just what the issue before this Court requires us to do: determine whether the evolving national consensus bars the imposition of the death penalty on juveniles today, even though it did not bar it fourteen years ago. To say that this determination must be made based on the state of the law and standards that existed when ***Stanford*** was decided in 1989, and that to do otherwise is to overrule ***Stanford***, is simply incorrect. This Court clearly has the authority and the obligation to determine the case before it based on current - 2003 - standards of decency. ***See Patterson v. Texas*, 536 U.S. 984, 985, 123 S.Ct. 24, 24 (2002)** (Ginsburg, J. dissenting from denial of petition for writ) ("This Court's decision in *Atkins v. Virginia 536 U.S. 304 (2002)*, made it tenable for a petitioner to urge reconsideration of *Stanford v. Kentucky*, 492 U.S. 361 (1989) . . . ."); ***In Re Stanford*, 537 U.S. ___, 123 S.Ct. 472 (2002)** (Stevens, J. dissenting from denial of petition for writ) (Court should reconsider *Stanford* in light of *Atkins* because "even if we were not convinced in 1989 [that juveniles should not be subject to the death penalty] we should be all the more convinced today" because of the additional states barring such executions and because of the growth in scientific knowledge of the less than fully developed nature of the adolescent brain.).[6]

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[6]The dissent's suggestions that this Court should infer that the Supreme Court would not apply the ***Atkins*** principles to the juvenile execution context because the Supreme Court has denied petitions for writs in ***Patterson*, *Stanford***, and similar cases involving juveniles itself ignores the fact that the Supreme Court "has rigorously insisted that such a denial carries no implication whatever regarding the Court's views on the merits of the case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated." ***Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950)**; ***see also Teague v. Lane*, 489 U.S. 288, 296 (1989)** (because a variety of considerations underlie the denial of a writ, such denials should be accorded no precedential value). ***Cf. Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 61 (Mo. banc 1999)** (denial of petition for writ is not a conclusive decision on the merits of the issue presented).

B. A National Consensus Against the Juvenile Death Penalty.

As the discussion of ***Thompson*, *Stanford*, *Penry*,** and ***Atkins*** makes evident, many of the same principles and factors that have guided the Supreme Court's determination of the constitutionality of the death penalty for the mentally retarded have also guided the Supreme Court's determination of the constitutionality of the death penalty for juveniles. This Court therefore will use ***Atkins***' approach in addressing whether a national consensus has developed against the juvenile death penalty since ***Stanford***, looking at: (1) the extent of legislative action against or in favor of the juvenile death penalty; (2) the frequency of the imposition of the death penalty on juveniles in modern times, and the frequency with which it is carried out even when imposed; (3) national and international opinion on the juvenile death penalty; and (4) an independent examination of whether the death penalty for juveniles violates evolving standards of decency and so is barred by the Eighth and Fourteenth Amendments.

1. Legislative Action Has Consistently Been Against the Juvenile Death Penalty. At the time that ***Penry*** was decided in 1989, only two states had outlawed executing the mentally retarded, and the Supreme Court found that this was not sufficient to constitute a national consensus. In deciding that developments of the intervening years between ***Penry*** and ***Atkins*** demonstrated that a national consensus had developed against executing the mentally retarded, ***Atkins*** relied heavily on the fact that sixteen more state legislatures had barred execution of the mentally retarded, while no additional states had permitted it. It found this persuasive not principally

because of the number of states that had passed such laws, but because of the consistency of the changes in the direction of opposition to the death penalty for the mentally retarded.

That same consistency of change has been shown in opposition to the juvenile death penalty. Indeed, the change was in the process of occurring when ***Stanford*** was decided. At the time of ***Stanford***, eleven states barred the juvenile death penalty. This was substantial, but not yet enough to constitute a national consensus.

Since ***Stanford***, however, and despite what ***Atkins*** called the popularity of "law and order" legislation, five more states have banned the practice of executing juvenile offenders. Two have done so by adopting legislation raising the age of execution to 18,[7] and two have done so by newly reinstating the death penalty, but only for those offenders who were 18 or older at the time of their offense.[8] The Washington Supreme Court has also held that its death penalty statute cannot be construed to authorize imposition of the death penalty for crimes committed by juvenile offenders,[9] thereby adding the state of Washington to the list of states in which the practice is now prohibited. Thus, a total of sixteen states - to which should be added federal civilian and military courts - require a minimum age of 18 for imposition of the death penalty, only two fewer than the eighteen states ***Atkins*** identified as prohibiting

[7]Indiana (S. 426, 112th Leg., Reg. Sess., 2002 In. Laws) and Montana (H.B. 374, 1999 Leg., Reg. Sess., 1999 Mt. Laws).

[8]Kansas (Kan. Crime. Code Ann. sec. 21-46622 (Vernon 2001)) and New York (N.Y. Crim. Proc. Law sec. 400.27 (McKinney 2002)).

[9]***See State of Washington v. Furman*, 858 P.2d 1092, 1102-03 (Wash. 1993).**

execution of the mentally retarded.[10] If the twelve states and the District of Columbia that bar the death penalty entirely are added, the combined total is twenty-eight states that prohibit juvenile executions - two fewer than the thirty states that prohibited execution of the mentally retarded at the time ***Atkins*** was decided.

Moreover, as is the case with the mentally retarded, the change has consistently been in the same direction. No state since ***Stanford*** has lowered the age for execution from 18 to 17 or 16, although ***Stanford*** allowed states to do so.[11] Rather, the minimum age has either stayed the same or been raised, and the only two states to reinstate the death penalty since 1989 did so only for those 18 or older. In addition, many states, including Missouri, have recently considered legislation to raise the minimum age for executions to 17 or 18. **Streib, *supra*, at 7.** This accounts for the most legislative attention to the issue in twenty years. ***Id***. In 2000, a bill to abolish the death penalty in New Hampshire passed both houses of the state legislature, but was vetoed.[12]

[10]While, as noted in footnote 18 of ***Atkins***, this means there were many fewer states that raised their minimum age of execution to 18 after ***Stanford*** than there were states that barred the death penalty for the mentally retarded after ***Penry***, this in part reflects the fact that eleven states had already acted to bar the juvenile death penalty before ***Stanford*** was even decided. It would be the ultimate in irony if the very fact that the inappropriateness of the death penalty for juveniles was broadly recognized sooner than it was recognized for the mentally retarded were to become a reason to continue the execution of juveniles now that the execution of the mentally retarded has been barred.

[11]Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes*, January 1, 1973-June 30, 2003, at 7, *available at* http://www.law.onu.edu/faculty/streib/juvdeath (last modified July 1, 2003).

[12]HB 1548 (N.H. 2000).

2. Infrequency of Imposition of Death Penalty. In ***Atkins***, the Supreme Court also found persuasive the fact that execution of the mentally retarded had become truly unusual. Many states that nominally had the death penalty on their books no longer imposed it at all or had never imposed it on a mentally retarded person, and only a total of five persons known to be mentally retarded had been executed in the United States in the thirteen years following the Court's decision in ***Penry***. ***Atkins*, 536 U.S. at 316.**

The practice of executing those under 18 has become similarly uncommon today. Although twenty-two states theoretically permit the death penalty for juveniles, only six (Missouri, Texas, Virginia, Georgia, Oklahoma, and Louisiana) have actually executed a juvenile offender since ***Stanford*** was decided fourteen years ago. **Streib, *supra*, at 3-4.** Of these six states, only three have executed juvenile offenders since 1993 - Texas, Virginia, and Oklahoma. ***Id.* at 4.** Louisiana last executed a juvenile offender in 1990; Georgia in 1993. ***Id.* at 3.** Missouri executed Frederick Lashley in 1993. That is the only officially recorded execution of a juvenile offender in Missouri since the state took over executions from Missouri's counties in 1937.[13]

Perhaps most telling is that, while at least 366 juvenile offenders have been executed in this country since 1642 (when the first juvenile offender execution occurred), only twenty-two of the 366 were carried out during the current era (1973-2003). ***Id.*** Of these twenty-two executions, Texas, Virginia, and Oklahoma together account for eighty-one percent of the

[13]According to one authority, the only other juvenile execution in Missouri occurred in 1921. American Bar Association, *Cruel and Unusual Punishment: The Juvenile Death Penalty*, Spring 2003, at 2, *available at* http://www.abanet.org/crimjust/juvjus/-factsheets_evolving_standards.pdf (last visited Aug. 1, 2003).

juvenile executions. ***Id.* at 5.** Although Alabama, Arizona, Arkansas, Delaware, Idaho, Kentucky, Mississippi, Nevada, Pennsylvania, South Dakota, Utah, and Wyoming all theoretically permit the death penalty for 16-year-olds, and while Florida, New Hampshire, and North Carolina theoretically permit it for 17-year-olds, none of these states has executed a juvenile since the death penalty was re-established in 1976. ***Id.* at 3-4, 6.** All but South Dakota and New Hampshire, however, have executed other offenders during that period.[14] Indeed, even where juries have imposed a death sentence on a juvenile since the reinstatement of the death penalty in 1976, its application has consistently been reversed by the courts on a variety of grounds, making South Carolina the only other state (other than Texas, Louisiana, Missouri, Georgia, Virginia, and Oklahoma) to carry out a juvenile execution since 1976. ***Id.* at 3.** As the chart attached as Appendix A graphically demonstrates, more mentally retarded persons than juveniles have been executed, in more states, since the death penalty was reinstated in 1976.[15]

As ***Atkins*** noted in regard to the mentally retarded, in light of the small number of executions of juvenile offenders carried out in the last decade, legislatures in states with a juvenile death penalty may have seen little reason to pass legislation barring it. Juveniles are so seldom executed that, other than perhaps in Texas and Virginia, the death penalty for juveniles has become so truly unusual that its potential

[14]These and other statistics about executions are collected by the Death Penalty Information Center and can be found at www.deathpenaltyinfo.org. ***See also*** statistics collected at http://www.asc41.com/policypaper2.html by the American Society of Criminology.

[15]ABA Juvenile Justice Center, *Comparison: Executions of Juveniles and Mentally Retarded Persons by State Since 1976* (Feb. 20, 2003), *at* http://www.abanet.org/crimjust/juvjus/juvandmr.pdf.

application is more hypothetical than real.

But, the likelihood of such an execution is not hypothetical in Missouri today. The state argues that Missouri should become the only state other than Texas, Virginia, and now Oklahoma to carry out more than one juvenile execution since the reinstatement of the death penalty in 1976.

3. National and International Consensus. Opposition to the juvenile death penalty by professional, social, and religious organizations has been longstanding. At the time ***Stanford*** was decided, a large number of groups, including the ABA, child advocacy groups, psychiatric organizations, and church and religious groups filed amicus briefs urging an end to such executions.[16] Since ***Stanford***, additional organizations of professionals have also called for an end to the death penalty,

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[16]***Stanford*** cited the following list of organizations, all of which filed briefs *amicus curiae* in support of the petitioners in ***Stanford***: American Bar Association; Child Welfare League of America; National Parents and Teachers Association; National Council on Crime and Delinquency; Children's Defense Fund; National Association of Social Workers; National Black Child Development Institute; National Network of Runaway and Youth Services; National Youth Advocate Program; and American Youth Work Center; American Society for Adolescent Psychiatry and American Orthopsychiatric Association; Defense for Children International - USA; National Legal Aid and Defender Association; and National Association of Criminal Defense Lawyers; Office of Capital Collateral Representative for the State of Florida; International Human Rights Law Group; American Baptist Churches; American Friends Service Committee; American Jewish Committee; American Jewish Congress; Christian Church (Disciples of Christ), Mennonite Central Committee; General Conference Mennonite Church; National Council of Churches; General Assembly of the Presbyterian Church; Southern Christian Leadership Conference; Union of American Hebrew Congregations; United Church of Christ Commission for Racial Justice; United Methodist Church General Board of Church and Society; and United States Catholic Conference; West Virginia Council of Churches; and Amnesty International. ***Stanford*, 492 U.S. at 388 n.4** (Brennan, J. dissenting).

including: The American Psychiatric Association, The American Academy of Child and Adolescent Psychiatry, The National Mental Health Association, The National Center for Youth Law, The Coalition for Juvenile Justice, The American Humane Association, and The Constitutional Project (a bipartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues).

Additional groups of faith also have issued statements in opposition to the death penalty, including: American Baptist Churches in the USA, American Ethical Union, American Friends Service Committee, American Jewish Committee, Amnesty International, The Bruderhof Communities, Central Conference of America, Christian Church (Disciples of Christ), Church of the Brethren, Church Women United, The Episcopal Church, Evangelical Lutheran Church in America, Fellowship of Reconciliation, Friends Committee on National Legislation, Friends United Meeting, General Conference of General Baptists, General Conference Mennonite Church, The Mennonite Church, The Moravian Church in America, YMCA of the USA, Mormans for Equality and Social Justice, The Orthodox Church in America, National Council of the Churches of Christ, Presbyterian Church (USA), The Rabbinical Assembly, Reorganized Church of Jesus Christ of Latter Day Saints, Reformed Church in America, Unitarian Universalist Association, Union of American Hebrew Congregations, United Methodist Church, United Church of Christ, and United States Catholic Conference.[17] A recent poll found that only thirty-four percent of Missourians support the death penalty for juveniles.[18]

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[17]These groups have set out their views on a web site that can be found at www.deathpenalty religious.org/education.

[18]Juvenile Offender Public Opinion Survey, Center for Advanced Social Research, University of Missouri-Columbia (Mar. 2003), *available at* http://www.abanet.org/crim-just/juvjus/mopoll.pdf.

While ***Stanford*** found the opposition of social, professional, and religious groups to be of little importance, the Court's more recent decision in ***Atkins*** clearly demonstrated a shift back to reliance on such evidence to confirm the national consensus that evolving standards of decency proscribe imposition of the death penalty on the mentally retarded. ***Atkins*, 536 U.S. at 316 n.21**.

Similarly, here, although by no means dispositive, we find the opposition to the juvenile death penalty of the wide array of groups within the United States listed above to be consistent with the legislative and other evidence that current standards of decency do not permit the imposition of the death penalty on juveniles. We also find of note that the views of the international community have consistently grown in opposition to the death penalty for juveniles. Article 37(a) of the United Nations Convention on the Rights of the Child and several other international treaties and agreements expressly prohibit the practice. **Streib, *supra*, at 7**. According to Amnesty International, officially sanctioned executions of juveniles have occurred in only two other countries in the world in the last few years, Iran and The Republic of the Congo (DRC). **Amnesty International, *Juveniles: The Death Penalty Gives up on Juvenile Offenders*** (July 28, 2003), *at* **http://www.amnestyusa.org/abolish/juveniles**. Of the last seven juvenile offender executions, five occurred in the United States. **Streib, *supra*, at 7**.

4. Independent Examination of Death Penalty. Atkins also undertook an independent analysis of whether the death penalty was warranted for mentally retarded offenders by examining whether the social purposes intended to be served by the death penalty, retribution and deterrence, applied to mentally retarded offenders. ***Atkins*, 536 U.S. at 318-19**. The Supreme Court found that neither purpose would be furthered by executing the mentally retarded, as such individuals are

inherently less culpable than other actors and less able to deliberate about their actions and, thus, are less able to be deterred by awareness that their crime could result in death. ***Id.* at 319-21**. Further, ***Atkins*** found that it was necessary to categorically exclude the mentally retarded from execution, rather than allowing their mental capacity to be considered on a case-by-case basis, because their reduced mental capacity would increase the possibility of false confessions and reduce their ability to show mitigation or assist counsel, so that "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution." ***Id.* at 321.** Lastly, it concluded: "As *Penry* demonstrated . . . reliance on mental retardation as a migrating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." ***Id.***

Similarly, as to juveniles, neither retribution nor deterrence provides an effective rationale for the imposition of the juvenile death penalty, and the risk of wrongful execution of juveniles is enhanced for reasons similar to that set out in ***Atkins*** in regard to the mentally retarded. While the parties have cited this Court to numerous current studies and scientific articles about the structure of the human mind, the continuing growth of those portions of the mind that control maturity and decision-making during adolescence and young adulthood, and the lesser ability of teenagers to reason, this Court need not look so far afield. The Supreme Court recognized the lesser culpability and developing nature of the adolescent mind in its 1988 decision in ***Thompson*, 487 U.S. at 835**, in which it stated, "there is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults," ***id*, at 834**, and therefore "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." ***Id.* at 835. *Thompson*** noted that it was not the first time that the Court had been called upon to recognize the lesser culpability of the young, for in ***Eddings* v.**

***Oklahoma*, 455 U.S. 104, 115-16 (1982)**:

> We stressed this difference in explaining the importance of treating the defendant's youth as a mitigating factor in capital cases: "But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults . . . ."

Thompson*, 487 U.S. at 834.** ***Thompson then stated:

> Thus, the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.

Id.* at 835** (footnotes omitted). ***Thompson concluded, "The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." ***Id.*** Although Mr. Simmons is 17 rather than 15, he is still an adolescent, and this Court finds the rationales set forth in

Thompson and ***Eddings*** apply here.[19]

Similarly, the deterrence function of the death penalty can have little application to juveniles, not just because of their lesser ability to reason and their lack of informed judgment, but because, as discussed *supra*, the imposition of the death penalty on 16-year-olds and 17-year-olds has become so unusual in the last decade that "the likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually non-existent." ***Thompson*, 487 U.S. at 837** (discussing effect of infrequency of executions of those 15 and younger).

Finally, as Mr. Simmons notes, the risk of wrongful execution also is greater as to younger offenders, who have had less time to develop ties to the community, less time to perform mitigating good works, and less time to develop a stable work history, than is true of adult offenders, and who are far more likely than adults to waive their rights and to give false confessions. Moreover, although nominally under Missouri law defendants are permitted to use their youth as a mitigating factor, this case provides a graphic illustration of the fact that their youth can become a further argument against them. In closing argument in Mr. Simmons' case, the state argued that the jury should not let him use his age to protect himself because if it did so, then he "wins." The state then argued, "Think about age. Seventeen years old. Isn't that scary. Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary." Thus, Mr. Simmons' youth was used to suggest greater immorality and future dangerousness and so to provide a further reason to impose the death penalty.

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[19] ***Stanford*** did not find these rationales inapplicable to those 16 or 17 at the time of their crime, but instead found these issues irrelevant.

For these reasons, this Court concludes that the Supreme Court of the United States would hold that the execution of persons for crimes committed when they were under 18 years of age violated the "evolving standards of decency that mark the progress of a maturing society," and is prohibited by the Eighth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment.[20]

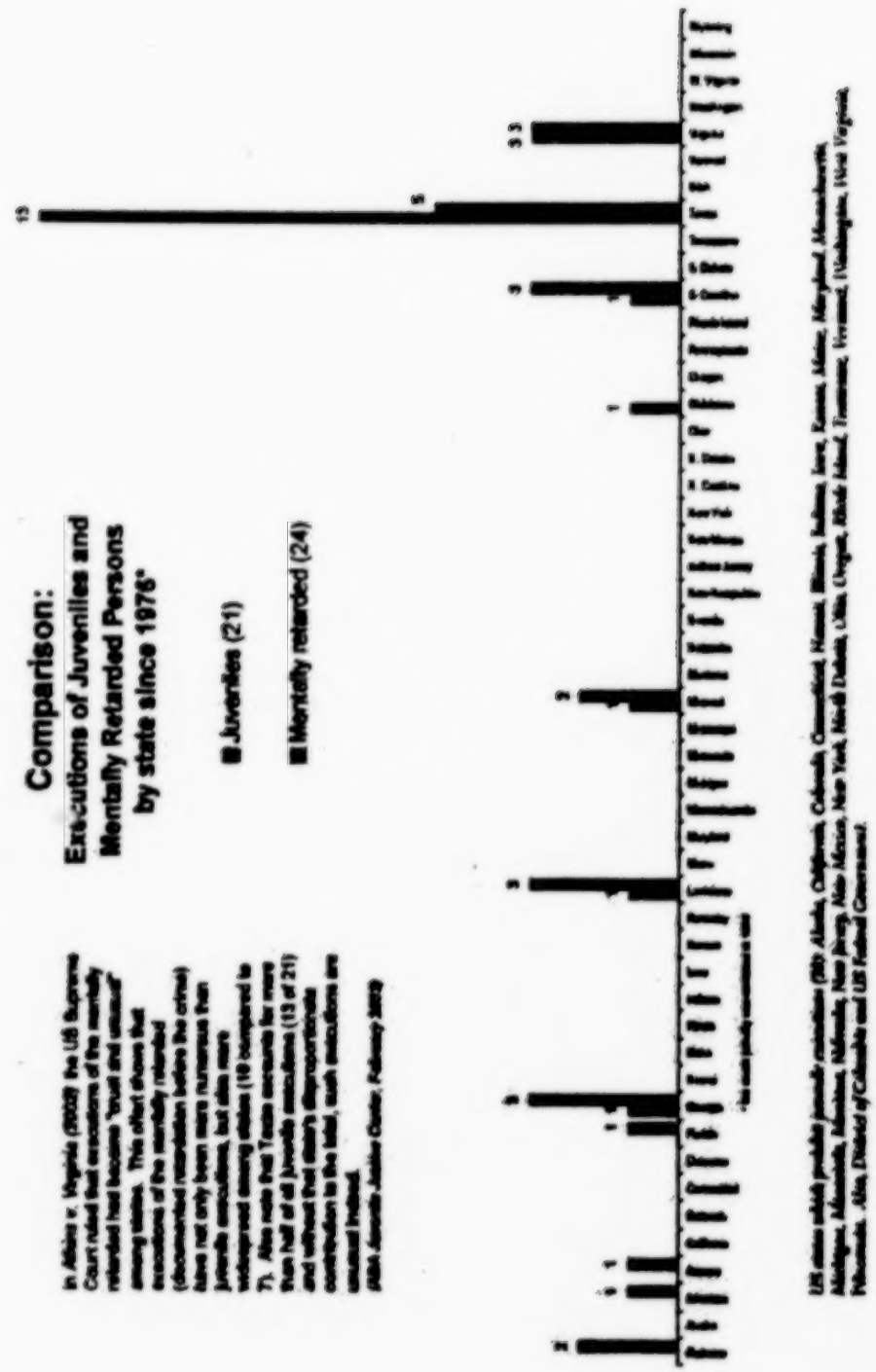
IV. CONCLUSION

For the reasons set out above, this Court sets aside Mr. Simmons' death sentence and re-sentences him, pursuant to the Court's authority under Sec. 565.035 RSMo 2000, to life imprisonment without eligibility for probation, parole, or release except by act of the Governor.

Laura Denvir Stith, Judge

White, C.J., Wolff and Teitelman, JJ., concur;
Wolff, J., also files separate concurring opinion;
Price, J., dissents in separate opinion filed; Benton and Limbaugh, JJ., concur in opinion of Price, J.

[20]Because the Eighth and Fourteenth Amendments afford Mr. Simmons relief, this Court need not reach Mr. Simmons alternative argument that, even if his execution is not barred by the Eighth Amendment, it is barred by article 1, section 21 of the Missouri Constitution.



SUPREME COURT OF MISSOURI

en banc

State ex rel. Christopher Simmons,	)	
Petitioner,	)	
vs.	)	**No. SC84454**
Donald P. Roper, Superintendent, Potosi Correctional Center,	)	
Respondent.	)	

CONCURRING OPINION

I concur in the principal opinion and in its holding that the Eighth Amendment's prohibition of cruel and unusual punishments bars the execution of those who were younger than 18 when their crimes were committed.

Both the principal opinion and the dissent strive earnestly to follow relevant precedent of the United States Supreme Court - whether that be the line of reasoning in *Atkins v. Virginia*, 536 U.S. 304 (2002), or the result in *Stanford v. Kentucky*, 492 U.S. 361 (1989). That Court's views may be as divided as this Court's. The underlying premise of both views is that the constitution forbids the execution of a person who, at the time of the crime, was not fully capable of the kind of adult moral judgment that would hold the offender subject to the death penalty for his crime.

The use of chronological age in making these judgments

- as the Court did in *Stanford* and in *Thompson v. Oklahoma*, 487 U.S. 815 (1988) - invites the drawing of a bright line as to the age at which a murder defendant may be subject to the death penalty.

The legislature has drawn the line for eligibility for the death penalty at age 15. Section 565.020.2.[1] The age-15 standard is consistent with *Thompson v. Oklahoma*, which held that a child who committed a crime when he was 15 or younger cannot receive the death penalty because of the Eighth Amendment's proscription of cruel and unusual punishments. Citing evolving standards, the principal opinion here holds that the line is now drawn at age 18.[2]

What is the nature of this judicial or legislative judgment? When any given age is used, it reflects a judgment that those below that age cannot be fully responsible in terms of being subject to the death penalty. The line is drawn because of the judgment that most if not all persons of such a youthful age are not morally capable of being fully responsible for their acts. This is true even though a child less than 18 may be tried as an

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[1]All references are to RSMo 2000 unless otherwise indicated. Section 565.020.2 provides that the death penalty may not be applied where the defendant "has not reached his sixteenth birthday at the time of the commission of the crime."

[2]In *Brennan v. State*, 754 So.2d 1 (Fla. 1999), where the Florida Supreme Court held that 16-year-old defendants may not be subjected to the death penalty, Judge Anstead, specially concurring, wrote, "[s]omeone must draw these important lines, and in our unique framework of sharing governmental powers, this function of constitutional line-drawing has been assigned to the judicial branch." *Id.* at 12 n.15 (citing *Thompson v. Ok.*, 487 U.S. 815, 840 (1988)). Judge Anstead was aware of the arbitrariness that could result from such line drawing: "inevitably, there will be cases where one day's difference in age will be the determinative factor between life and death." *Id.*

adult, found guilty, and receive an adult non-capital sentence. *See* section 211.071.

The legislature traditionally has drawn lines by chronological age based on assumptions or experience as to maturity.[3] There is some judicial authority for deferring to the legislature in this regard even as to capital punishment of those of a certain age, *see Thompson v. Oklahoma*, 487 U.S. at 854 (1988) (O'Connor, J., concurring) ("I would not substitute our inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the Nation's legislatures."). The *Thompson* decision itself, however, stands for the proposition that line drawing in capital cases is a prerogative of the judicial in its role of safeguarding Eighth Amendment rights.

Judges have long drawn lines by chronological age. The common law - judge-made law - has had a rich, if somewhat checkered history of recognizing age categories when it comes to criminal responsibility. Under the common law, a child who reached the age of 14 was fully responsible for crimes as an adult. Under the age of seven the common law determined that a person had no criminal capacity. Between the ages of seven and 14, there was a rebuttable presumption that the child lacked capacity to be criminally responsible for the child's acts. The common law placed the burden on the prosecution to rebut the presumption of incapacity. ROLLIN M. PERKINS, CRIMINAL LAW 837 (2d ed. 1969).

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[3] *See* section 311.325 (setting the minimum drinking age at 21); section 115.133 (setting the minimum voting age at 18); section 431.061 (consent to surgical or medical treatment); section 431.056 (minors' capacity to enter into contracts); section 451.090 (minors' capacity to enter into marriage contract); section 302.060 (age one can obtain a driving license); section 474.310 (must be 18 to make a will); and section 494.425 (must be 21 to serve on a jury).

The common law, as Perkins has noted, has some grim examples: In the 13th century, a seven-year-old boy was tried for murder; his execution was "pardoned for the king's sake." *Id.* at 838. English records also show that a 13-year-old girl was executed for killing her mistress, a 10-year-old boy was executed for killing a companion, and an eight-year-old boy was similarly punished for "maliciously" burning some barns. *Id.* Perkins also notes that American records show the execution of two 12-year-old boys for murder. *Id.* The standards of decency, cited by the United States Supreme Court and by the principal opinion in this case, seem certainly to have evolved. *Atkins v. Virginia*, 536 U.S. 304 (2002). But evolved how far?

Missouri's death penalty statute states that the jury, in determining whether or not to recommend the death penalty, can consider "age," but without elaborating how age is to be considered. Section 565.032.3(7). Despite the lack of elaboration in the statute, the jury is instructed to consider age as a mitigating factor. In this case, in the penalty phase final argument, the defense and the prosecution used Simmons' age in their arguments. In mitigation, the defense talked about 17-year-olds and their inability to think about the future, and about the fact that a person of 17 cannot vote or lawfully drink alcohol, but can be subject to the death penalty. The prosecutor used Simmons' age to argue that he should be put to death. The prosecutor's argument was: "Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary." The prosecutor seems to have implied that if Simmons was this bad at 17, he could only get worse.

The principal opinion draws a bright line based on the Eighth Amendment's prohibition of cruel and unusual punishments. However, if the Supreme Court of the United States does not agree with this Court's conclusion that the

standard of decency has evolved to that point, the issue is certainly appropriate for a factual determination on a case-by-case basis. In that event, this Court may wish to take a cue from the statute's reference to age and borrow the "presumption" concept from the common law.

An updated version would be: A 16 or 17-year-old is presumed not to have the capacity to be fully responsible and, therefore, eligible for the death penalty. In the penalty phase, the state could present evidence of the youthful defendant's full capacity, with the defense entitled to present evidence that the defendant was not fully responsible at the time of the crime so as to be eligible for the death penalty.[4] The state would have the burden of overcoming the presumption. The issue of responsibility, in the sense of eligibility for the death penalty, would become the subject of a jury finding, rather than a line drawn by the Court.

Using age as a bright line in juvenile death penalty cases involving 16 and 17 year-olds may be considered unreliable because age, standing alone, is not the true relevant factor as to why it is arguably unjust to impose the death penalty. "Rather, age is simply a 'proxy' for a combination of factors such as maturity, judgment, responsibility, and the capability to assess

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[4]Courts often make decisions regarding the capacity of juveniles. For example, in certifying a juvenile to be tried as an adult, the youth's age, maturity and sophistication are considered. *State v. Thomas*, 70 S.W.3d 496, 501 (Mo. App. 2002); section 211.071.6. In *Thomas*, to evaluate whether the defendant, who was 16 at the time of the crime, should be tried as an adult, the chief juvenile officer prepared a report providing that the defendant "'appears to be of low average intelligence, responsive, . . . mature. . . appears to know the difference between right and wrong. . . appears to be sophisticated in his manner of living in that he makes his own decision.'" *Id.* To determine whether the defendant's capacity warrants the death penalty, evaluations similar to that performed for certification could be used.

the possible consequences of one's conduct." Joseph L. Hoffmann, "On the Perils of Line Drawing: Juveniles and the Death Penalty," 40 HASTINGS L.J. 229, 258 (1989). Because age does not correspond perfectly to the combination of relevant factors, its use as a bright line produces "comparative injustice" - that is, some may be spared who are fully capable of receiving the death penalty and others executed who should have been found incapable.

The alternative is the adoption of presumptions with respect to the age of the murderer in capital cases.[5] In a case such as this one, where the defendant was a 17-year-old murderer, the Court could hold that persons below the age of 18 are presumed to lack sufficient maturity to be eligible for the death penalty. This presumption would be subject to rebuttal by the state, in which case the unusually mature 17-year-old murderer could receive the death penalty. Proof of such capacity should be beyond a reasonable doubt.[6]

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[5]The dissenters in *Thompson v. Oklahoma* also may well have been open to individualized consideration when deciding whether to subject juvenile offenders to the death penalty. Justice Scalia wrote at the beginning of his dissenting opinion that, "[i]f the issue before us today were whether an automatic death penalty for conviction of certain crimes could be extended to individuals younger than 16 when they commit the crimes, thereby preventing individualized consideration of their maturity and moral responsibility, I would accept the plurality's conclusion that such a practice is opposed by national consensus . . . . I might even agree with the plurality's conclusion if the question were whether a person under 16 when he commits a crime can be deprived of the benefit of a rebuttable presumption that he is not mature and responsible enough to be punished as an adult." 487 U.S. 815, 859.

[6]It can be argued that the statutory line that bars execution of offenders who were under age 16 at the time of their offenses contains a presumption that those age 16 and above are eligible from the death penalty. The statutory reference to age, and the jury instruction that age be considered a mitigating factor, would place the burden on the young offender to rebut

Individualized treatment in juvenile death penalty cases would preserve the capital sentencing option while eliminating or diminishing the comparative injustice problem associated with line-drawing governed solely according to a defendant's age.

If the Supreme Court of the United States does not agree that age 18 is where the line now should be drawn, the presumption suggested here should be adopted. This would not be based on the Eighth Amendment's ban on cruel and unusual punishments, but rather a state-law interpretation of the statute that makes "age" a factor in capital sentencing.[7]

Requiring a specific jury finding on the youthful murderer's capacity would be consistent with this Court's overall duty to ensure that a person lacking full capacity at the time

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the statute's supposed presumption. However, establishing presumptions and burdens is traditionally a judicial function, though not exclusively so. In cases involving the death penalty, the judiciary's prerogative to establish presumptions and to assign the burdens of overcoming presumptions is a necessary part of the courts' duty to ensure that the death penalty is not wrongly imposed.

[7]Come to that, the presumption logically could be applied to those under 21. That is, after all, the age at which the legislature deems a person to be mature enough to pass judgment as a juror. Section 494.425. *But see, Stanford v. Kentucky*, 492 U.S. at 374-377. However, the presumption against the death penalty seems better suited for those ages 16 and 17 than for those over age 18. The justification for the presumption is that the death penalty is not appropriate for most persons of a certain age and, thus, the state should have the burden of showing that the less probable case - that the particular offender is mature enough to be subject to the death penalty - is true. If most but not all of those over age 18 are suitable for the death penalty, then a defendant may appropriately have the burden of showing that, in his case, age is a sufficiently mitigating circumstance to avoid the death penalty.

of the crime not be subject to the death penalty.[8]

This alternative should be used only if the Eighth Amendment's prohibition of cruel and unusual punishments is held not to bar execution of those who were younger than 18 when they committed their crimes. Because I believe the constitution does bar such executions, I concur in the principal opinion.

Michael A. Wolff, Judge

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[8]Another statutory basis for holding persons under the age of 18 ineligible for the death penalty may be found in the duty of this Court to ensure proportionality under section 565.035.3(3) RSMo. 2000. This section requires this Court to determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and *the defendant*." (emphasis added) As the principle opinion's historical analysis demonstrates, in the last decade the death penalty has rarely been imposed on persons under the age of 18. If the sentence of death for a murderer who is less than 18 years old is compared to other sentences of murderers who were the same age, the likelihood of an under-18 murderer receiving the death penalty approaches the likelihood of being struck by lightning. The death penalty for under-18 offenders would appear to be disproportionate.

SUPREME COURT OF MISSOURI

en banc

State ex rel. Christopher Simmons,	)
Petitioner,	)
vs.	)**No. SC84454**
Donald P. Roper, Superintendent, Potosi Correctional Center,	)
Respondent.	)

DISSENTING OPINION

I.

I respectfully dissent.

Our constitutional form of government allows for the will of the people to be expressed, for better or worse, through the laws enacted by their elected representatives. The role of the courts is merely to interpret such statutes and to rule upon their constitutionality, if necessary.

Missouri has enacted section 565.020.2, RSMo, providing that individuals over the age of sixteen, who knowingly cause the death of another after deliberation may be subjected to the death penalty. Although this statute is subject to serious controversy, it is the enacted will of the people of Missouri and must be enforced unless it is in violation of either the Missouri or the United States Constitutions.

The majority opinion of this Court holds that section 565.020.2 violates the United States Constitution. This opinion is directly in conflict with the United States Supreme Court decision of *Stanford v. Kentucky*, 492 U.S. 361 (1989), consolidated with *Wilkens v. Missouri*, No. 87-6026, which specifically states:

> We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment.
>
> The judgments of the Supreme Court of Kentucky and the Supreme Court of Missouri are therefore affirmed.

492 U.S. at 380.

The United States Supreme Court has not overruled *Stanford*, even in light of its decision in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), nor after recent consideration of the precise arguments relied upon by the majority of this Court, *see Mullin v. Hain*, 538 U.S. ___, 123 S.Ct. 1654 (2003) (mem.) (order granting application to vacate the stay of execution of defendant who was seventeen years old when he committed murder); *In re Stanford*, 537 U.S. ___, 123 S.Ct. 472 (2002) (denying writ of *habeas corpus* of petitioner who was seventeen years when he committed murder); *Patterson v. Texas*, 536 U.S. ___, 123 S.Ct. 24 (2002) (denying writ of *habeas corpus* of petitioner who was seventeen years old when he committed murder). It is the United States Supreme Court's prerogative, and its alone, to

overrule one of its decisions. *United States v. Hatter*, 532 U.S. 557, 567 (2001); *Hohn v. United States*, 524 U.S. 236, 252-53 (1998); *State Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997); *Rodriguez de Quinas v. Shearson/American Express, Inc.*, 492 U.S. 477, 484 (1989).

This Court is bound by the United States Supreme Court's decision in *Stanford v. Kentucky* and simply has no authority to overrule that decision.

II.

Petitioner, Christopher Simmons, was born on April 26, 1976. On September 10, 1993, when he was approximately seventeen-years and five-months old, petitioner was arrested for the murder of Shirley Crook. Following a botched robbery attempt, petitioner kidnapped Ms. Crook, bound and gagged her. Petitioner walked Ms. Crook down a railroad trestle, bound her more, and pushed her, while still alive, over the trestle and into the Meramec River. Prior to the robbery, petitioner stated to his accomplice that they could commit a robbery and murder and get away with it because they were juveniles.

Petitioner now asks this court for *habeas corpus* relief, alleging that his death sentence is illegal because he was a juvenile at the time of his crime. Petitioner acknowledges that *Stanford v. Kentucky*, 492 U.S. 361 (1989), explicitly held that the United States Constitution was not violated by the execution of a sixteen or seventeen-year-old defendant. However, petitioner alleges that the United States Supreme Court's recent decision, *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), "***implicitly*** overrules the controlling precedent of *Stanford* . . . ." (emphasis added).

Stanford specifically addressed Missouri's capital punishment statute in determining that there was "neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age" and "such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment." *Stanford*, 492 U.S. at 366, 380. *Stanford* noted its petitioner's failed to establish a societal "consensus against capital punishment for 16 and 17-year-old offenders through state and federal statutes and the behavior of prosecutors and juries . . . . " *Id.* at 377. The Supreme Court explicitly refused to consider "other indicia, including public opinion polls, the views of interest groups, and the positions adopted by various professional associations." *Id.* "A revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved." *Id.*

The United States Supreme Court did not overrule *Stanford* in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002). *Atkins* did not deal with juveniles, but address capital punishment of mentally retarded persons. *Id.* at 2244. The Court held that capital punishment of the mentally retarded was cruel and unusual for two reasons: 1) mentally retarded persons "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct," *Id.*; and 2) the prevailing standards of decency reflected by objective standards such as legislatures, experts, and the public establish a consensus against imposing capital punishment upon the mentally retarded. *Id.*

United States Supreme Court decisions interpreting the Constitution are the supreme law of the land. *Cooper v. Aaron*,

358 U.S. 1, 18 (1958).[1] "State court judges in Missouri are bound by the 'supreme law of the land,' as declared by the Supreme Court of the United States (Art. VI, Constitution of the United States)." *Kraus v. Bd. of Educ.*, 492 S.W.2d 783, 784 (Mo. 1973). *See also Rodgers v. Danforth*, 486 S.W.2d 258, 259 (Mo. banc 1972) (citing U.S. Const. art. VI; *Cooper*, 358 U.S. 1 (1958) (This court "is bound to follow the decisions of the Supreme Court of the United States.").

This Court's solemn duty to abide by decisions of the Supreme Court of the United States is not abridged simply because we disagree with that Court's decision or even if it appears that a decision was clearly in error. Neither can this Court imply or anticipate the overruling of a decision of the United States Supreme Court.

In *State Oil Co. v. Kahn*, the court of appeals "characterized [the United States Supreme Court's previous decision] as 'unsound when decided' and 'inconsistent with later decisions' of [that] Court," but "felt constrained to follow that decision." 522 U.S. 3, 9 (1997) (citation omitted). The Supreme Court of the United States agreed with the appellate court's characterization of its previous opinion, but applauded the court of appeals for respecting the doctrine of *stare decisis*. *Id.* at 20.

> Despite what Chief Judge Posner aptly described as *Albrecht's* "infirmities, [and] its increasingly wobbly, motheaten foundations," there remains the question whether *Albrecht*

[1] "[T]he interpretation of [the Constitution] enunciated by this Court in [its decision] is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the contrary notwithstanding.'" *Cooper*, 358 U.S. at 18.

> deserves continuing respect under the doctrine of *stare decisis*. The Court of Appeals was correct in applying that principle despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents.

Id. (internal citation omitted).

Similarly, *Rodriquez de Quinas v. Shearson/American Express, Inc.* noted a shift away from "the old judicial hostility to arbitration." 490 U.S. 477, 480 (1989). That view had "been steadily eroded over the years" and the Court itself took notice of the shift in a prior opinion. *Id.* at 480-81. However, the Supreme Court "did not suggest that the Court of Appeals on its own authority should have taken the step of renouncing" the Court's prior decision. *Id.* at 484.

> If a precedent of [the Supreme Court of the United States] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals [or other court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Id.

The Supreme Court of the United States has not chosen to exercise its prerogative of overruling *Stanford v. Kentucky*, despite several very recent opportunities to do so. *See Mullin v. Hain*, 538 U.S. ___, 123 S.Ct. 1654 (2003) (mem. order); *In re Stanford*, 537 U.S. ___, 123 S.Ct. 472 (2002); *Patterson v. Texas*, 536 U.S. ___, 123 S.Ct. 24 (2002). In each case, the defendant was seventeen-years-old when he committed the

crime for which he was sentenced to death. The Supreme Court refused to reexamine *Stanford v. Kentucky* despite vigorous dissents raising precisely the same arguments as presented to this Court.

While the majority of this Court might believe that *Stanford v. Kentucky* has been abandoned in light of *Atkins* and in light of their perception of a national consensus regarding capital punishment of juvenile offenders, their belief and perception are not sufficient to preempt the Supreme Court of the United States concerning its existing precedent.

It is the prerogative of the Supreme Court of the United States, and its alone, to overrule one of its decisions.

The proper venue for Simmons to seek relief on this issue is the Supreme Court of the United States. I would deny the writ.

_____

William Ray Price, Jr., Judge

No. SC84454
In the Supreme Court of Missouri

May Session, 2003

State ex rel. Christopher Simmons,
Petitioner,

v. HABEAS CORPUS

Donald P. Roper, Superintendent,
Potosi Correctional Center,
Respondent.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here now being sufficiently advised of and concerning the premises doth consider and adjudge that the Petitioner is discharged to the custody of the superintendent of the Potosi Correctional Center and that Petitioner's death sentence is set aside and Petitioner is resentenced to life imprisonment without eligibility for probation, parole or release except by act of the Governor all in conformity with the opinion of this Court herein delivered.

(Opinion filed.)

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 2003, and on the 26th day of August 2003, in the above entitled cause.

Given under my hand and seal

of said Court, at the City of Jefferson, this 26th day of August 2003.

\s\ _____

Clerk

\s\ _____

D.C.

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